

THE AMERICAN UNIVERSITY LAW REVIEW

VOLUME 26

WINTER 1977

NUMBER 2

STATE RESPONSIBILITY FOR INJURIES TO ALIENS OCCASIONED BY TERRORIST ACTIVITIES*

RICHARD B. LILLICH**
JOHN M. PAXMAN***

	<i>Page</i>
PART I. INTRODUCTION	219
PART II. STATE RESPONSIBILITY FOR FAILURE TO PREVENT INJURIES CAUSED BY TERRORISM	222
SECTION A. <i>State Responsibility for Local Terror- ism</i>	222

* © The Procedural Aspects of International Law Institute, Inc., 1977. This article is based upon a working paper prepared by the Institute under a contract with the United States Department of State. The views expressed herein reflect the personal opinions of the authors, however, and thus are not necessarily the views either of the Institute or the Department of State.

The authors would like to express their appreciation to a panel of consultants—Professor A.A. Fatouros, Professor L.F.E. Goldie, Dean Bert B. Lockwood, Jr., and Professor Burns H. Weston—who helped plan and evaluate drafts of three memoranda which, considerably revised and expanded, became the basis of the Institute's working paper. They also would like to acknowledge the assistance of Messrs. Thomas E. Carboneau and Leonard Hanser, members of the second and third year classes of the University of Virginia School of Law, who prepared several "mini-memoranda" containing useful material for incorporation in the working paper and checked the footnotes of this article for form and substance.

** Professor of Law, University of Virginia School of Law, and President, Procedural Aspects of International Law Institute. A.B., 1954, Oberlin College; LL.B. with Specialization in International Affairs, 1957, Cornell Law School; LL.M. (in International Law), 1959, and J.S.D., 1960, New York University School of Law. Member of the New York Bar.

*** Research Associate, Procedural Aspects of International Law Institute. B.A., 1969, Brigham Young University; J.D., 1972, University of Virginia School of Law; Ph.D. candidate, Queens' College, Cambridge.

1.	<i>The duty to prevent injuries to aliens: general principles</i>	225
2.	<i>The duty to prevent acts of local terrorism</i>	231
3.	<i>Degrees of state involvement in local terrorism</i>	235
a.	<i>Support, toleration, and involvement re local terrorism</i>	237
i.	<i>Involvement of government personnel</i>	237
ii.	<i>Acquiescence in terrorism</i>	239
b.	<i>Negligence in failing to prevent local terrorism</i>	240
4.	<i>Summary and analysis</i>	245
SECTION B. <i>State Responsibility for Nonlocal Terrorism</i>		251
1.	<i>Some preliminary observations</i>	252
2.	<i>The duty to prevent the use of territory for the preparation of acts of nonlocal terrorism</i>	254
a.	<i>The Alabama Claims arbitration</i>	254
b.	<i>The Texas Cattle Claims</i>	258
c.	<i>The League of Nations treatment of the assassination of King Alexander</i>	260
3.	<i>Degree of state involvement in nonlocal terrorism</i>	262
a.	<i>Encouraging, tolerating, or acquiescing in the use of territory as a base for nonlocal terrorism</i>	262
b.	<i>Negligence in the prevention of use of territory as a base for nonlocal terrorism</i>	266
4.	<i>The pronouncements of the United Nations</i>	270
a.	<i>The Declaration on Friendly Relations</i>	270
b.	<i>The Definition of Aggression</i>	272
c.	<i>The Convention on the Protection of Diplomats</i>	273
5.	<i>Summary and analysis</i>	274
PART III.	STATE RESPONSIBILITY FOR FAILURE TO APPREHEND, PUNISH, OR EXTRADITE TERRORISTS	276
SECTION A. <i>The Duty to Apprehend and Punish Participants in Local Terrorism</i>		278
1.	<i>The nature of the duty to apprehend and punish</i>	278
2.	<i>Attempts to codify the duty to apprehend and punish</i>	281

3. <i>Degree of state involvement in the failure to apprehend, prosecute, and punish perpetrators of local terrorism</i>	284
a. <i>The duty to apprehend</i>	284
b. <i>The duty to prosecute</i>	287
i. <i>Escape or release</i>	289
ii. <i>Acquittal</i>	289
iii. <i>Amnesty</i>	290
c. <i>The duty to punish</i>	294
SECTION B. <i>The Duty to Apprehend and Punish Individuals Responsible for Nonlocal Terrorism</i>	297
1. <i>Asylum and acts of terrorism</i>	298
2. <i>Extradition and acts of terrorism</i>	300
SECTION C. <i>Summary and analysis</i>	305
PART IV. CONCLUSIONS AND RECOMMENDATIONS	307

I. INTRODUCTION

Scarcely a day passes without press reports of another act of transnational terrorism,¹ whether it be an aerial hijacking like the June

1. This article makes no attempt to define the term "terrorism." As Professor Baxter aptly observes, "[w]e have cause to regret that a legal concept of 'terrorism' was ever inflicted upon us. The term is imprecise; it is ambiguous; and above all, it serves no operative legal purpose." Baxter, *A Skeptical Look at the Concept of Terrorism*, 7 AKRON L. REV. 380, 380 (1974). Moreover, to paraphrase Mr. Justice Stewart, one may not be able to define it, but one knows it when one sees it. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion). The term therefore is used for linguistic convenience to cover a host of acts made criminal by the domestic law of most states, as well as certain acts—such as aerial piracy—specifically made criminal by international law.

The adjective "transnational" is used to denote terrorism with one or more international components, such as "incidents in which terrorists go abroad to strike their targets, select victims or targets because of their connection to a foreign state . . . , attack airliners on international flights, or force airliners to fly to another country." B. JENKINS, *INTERNATIONAL TERRORISM—A NEW MODE OF CONFLICT* 9 (California Seminar on Arms Control and Foreign Policy Research Paper No. 48, 1975). It does not cover "the local activities of dissident groups when carried out against a local government or citizen in their own country if no foreign connection is involved." *Id.*

Finally, for purposes of this article the phrase "transnational terrorism" itself is divided into two types, "local" and "nonlocal," depending upon where the terrorist act occurs. Under this distinction, adopted principally for the utilitarian purpose of organizing traditional state responsibility precedents, a state might incur liability for the failure to prevent the kidnapping of a foreigner within its borders—a case of local transnational terrorism—or for the failure to prevent a terrorist operation conceived locally but carried out in another state—a case of nonlocal transnational terrorism.

1976 takeover of the Air France airliner flown to Uganda,² a political kidnapping such as the spectacular seizure in December 1975 of the oil ministers from the Organization of Petroleum Exporting Countries (OPEC) in Vienna,³ or an indiscriminate act of violence designed to achieve publicity for its perpetrators or their cause. Such acts obviously present a serious challenge to the existing international legal order. At the outset, it has become apparent that, in Brian Jenkins' words, "[i]nternational law and the rules of warfare as they now exist are inadequate to cope with this new mode of conflict."⁴ Yet attempts to remedy the substantive gaps and structural defects of international law, both within and without the United Nations, have met with relatively little success. The United Nations Security Council debate following the Entebbe rescue operation⁵ revealed once again the wide divergence in the world community over how—and, indeed, perhaps even whether—to approach the transnational terrorism phenomenon.

Just because there has been little progress in formulating new norms and creating new procedures does not mean, of course, that international law has nothing to contribute to the effort to combat such terrorism. As Jenkins states, "[i]f international law is to have greater weight in this area of conflict, new laws must be created"; yet he adds this significant qualification: "or old ones modified to deal with the unique problems of international terrorism."⁶ One important body of traditional international law which provides a significant, if in some cases relatively marginal, sanction against transnational terrorism is the law of state responsibility for injuries to aliens. Derived from state practice, arbitral decisions and codification attempts over many years, this body of international law offers a rich vein of relevant precedent that can be worked for profit.⁷

2. The Times (London), July 16, 1976, at 1, col. 1. See generally W. STEVENSON, 90 MINUTES AT ENTEBBE (1976).

3. N.Y. Times, Dec. 22, 1975, at 1, col. 8. See note 22 & accompanying text *infra*.

4. B. JENKINS, *supra* note 1, at 16.

5. The United Nations Security Council debates concerning the Entebbe rescue operation took place from July 9-14, 1976. See generally 32 U.N. SCOR (1939th-1943d mtgs.), U.N. Docs. S/pv. 1939-1943 (1976).

6. B. JENKINS, *supra* note 1, at 15.

7. It is surprising that to date the relevance of the law of state responsibility for injuries to aliens has received only passing mention in the terrorism context. See C. BAUMANN, THE DIPLOMATIC KIDNAPPINGS: A REVOLUTIONARY TACTIC OF URBAN TERRORISM, 43-53 (1973); Kutner, *Constructive Notice: A Proposal to End International Terrorism*, 19 N.Y.L.F. 325, 343-44 (1973); Slomanson, *I.C.J. Damages: Tort Remedy for Failure to Punish or Extradite International Terrorists*, 5 CAL. W. INT'L L.J. 121 (1974); Strehel, *Terrorist Kidnapping of Diplomatic Personnel*, 5 CORNELL INT'L L.J. 189, 208-09 (1972). See also Rubin, *International Terrorism and International Law*,

Although rarely speaking directly to transnational terrorism, the norms governing state responsibility provide by analogy ample insights into how they might be applied in the terrorism context. In the first place, "such activities when emanating directly from the Government itself or indirectly from organisations receiving from it financial or other assistance or closely associated with it by virtue of the constitution of the State concerned, amount to a breach of International Law."⁸ Secondly, while the duty of a state to prevent the commission of acts injurious to foreign states, including acts injurious to their nationals as well, does not imply an obligation to suppress all inimical conduct by private persons or groups, "States are under a duty to prevent and suppress such subversive activity against foreign Governments as assumes the form of armed hostile expeditions or attempts to commit common crimes against life or property."⁹ Finally, even when a state does not incur responsibility for breach of the first two duties, it may render itself liable internationally as an "accessory-after-the-fact" if it "fails to take reasonable steps to apprehend and punish the wrongdoer, or if the punishment is so trivial as to be contemptuous of the wrong done to the alien."¹⁰ This duty to take reasonable steps to apprehend and punish arguably includes a duty to extradite if a state apprehends the wrongdoer but does not submit him to prosecution.

This article will examine the above state responsibility norms to see in what contemporary situations a state may be held responsible in damages for acts of terrorists that can be attributed to it. The article is organized in a functional manner. Part II covers a state's responsibility for failure to prevent injuries to aliens and their property caused by terrorism. Part III takes up the question of a state's responsibility for failure to apprehend, punish, or extradite terrorists. Part IV contains both conclusions and recommendations. It reflects the main thesis of the article: that attempting to hold states responsible in damages for the acts of terrorists when such acts can be attributed to them represents a strategic use of traditional international law norms which, in a given situation, may produce short-run benefits and, in any event, will contribute to the long-run interests of the world community.

in **TERRORISM: INTERDISCIPLINARY PERSPECTIVES** ch. 6 (S. Finger & Y. Alexander eds. forthcoming).

8. 1 L. OPPENHEIM, **INTERNATIONAL LAW** 293 (H. Lauterpacht 8th ed. 1955).

9. *Id.* at 292-93.

10. 2 D. O'CONNELL, **INTERNATIONAL LAW** 1028 (2d ed. 1970).

II. STATE RESPONSIBILITY FOR FAILURE TO PREVENT INJURIES CAUSED BY TERRORISM

Ninety years ago the Supreme Court of the United States, in *United States v. Arjona*,¹¹ stated that "the law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof . . ."¹² Assuming this statement is an accurate reflection of presently accepted norms of international law relating to state responsibility, what is its applicability to incidents of local and nonlocal terrorism?¹³

A. State Responsibility for Local Terrorism

The circumstances to which the analysis in this section applies involve factual settings similar to the following hypothetical situation. A small but well-organized group of individuals in state A kidnaps a citizen of state B, either an internationally protected person¹⁴ or a private individual, to strengthen its bargaining position with its own government. The kidnappers' purpose generally will be to achieve one or more objectives of a political nature. For example, in exchange for their hostage they may demand publicity for their cause, governmental reform, the immediate release or the reduction of sen-

11. 120 U.S. 479 (1887).

12. *Id.* at 484.

13. For definitions of terms used in this article, see note 1 *supra*.

14. Under the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, an "internationally protected person" is:

(a) a Head of State . . . , a Head of Government or a Minister for Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him;

(b) any representative or official of a State or any official or other agent of an international organization of an intergovernmental character who, at the time when and in the place where a crime against him, his official premises, his private accommodation or his means of transport is committed, is entitled pursuant to international law to special protection from any attack on his person, freedom or dignity, as well as members of his family forming part of his household.

G.A. Res. 3166, 28 U.N. GAOR, Supp. (No. 30) 146, U.N. Doc. A/9030 (1973) (not yet in force).

See generally Franck & Lockwood, *Preliminary Thoughts Towards an International Convention on Terrorism*, 68 AM. J. INT'L L. 69 (1974); Rozakis, *Terrorism and the Internationally Protected Persons in the Light of the ILC's Draft Articles*, 23 INT'L & COMP. L.Q. 32 (1974); Strehel, *supra* note 7; Wood, *The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents*, 23 INT'L & COMP. L.Q. 791 (1974); Note, *Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons: An Analysis*, 14 VA. J. INT'L L. 703 (1974).

tences of imprisoned comrades, or the payment of ransom—all specific objectives which also would serve their general objective, namely, to embarrass, discredit, and possibly bring down their present government.¹⁵

There have been several particularly noteworthy examples of political kidnappings for the purpose of securing the release of political prisoners. The 1969 kidnapping of United States Ambassador C. Burke Elbrick in Brazil and the subsequent release of fifteen political prisoners in exchange for his life is one example.¹⁶ Another example is the 1970 kidnapping and the eventual release of a West German consul in Spain by Basque nationalists while fifteen members of their organization were on trial in France. The French Government substantially reduced the sentences imposed by the court in the latter case a week after the consul's release.¹⁷

The seizures in Uruguay of Brazilian Consul-General Aloysio Dias Gomide and United States agronomist Claude Fly, toward the end of 1970, are typical examples of a kidnapping to obtain monetary ransom. The kidnappers, the Tupamaros, demanded \$1 million for each of their hostages, and Gomide's wife eventually paid some \$250,000.¹⁸ They released Fly in March 1971 when he suffered a heart attack, fearing the adverse publicity should he have died while in their custody.¹⁹

A variation on the above illustrations which further complicates the problems to be discussed in this section of the article arises when the host government refuses to bargain with the terrorist group and the latter kills the hostage. The 1970 execution of Dan A. Mitrione, a United States advisor to the government of Uruguay, is a notable example.²⁰ More recently, in 1975, the Montoneros, a guerrilla group,

15. One Brazilian terrorist explained the rationale for such kidnappings as follows:

We orient our armed actions in such a way as to make them politically profitable.

For instance, the kidnapping of a foreign diplomat creates political problems for the regime. Either the regime agrees . . . not to give in and allows the diplomat to be killed which creates difficulties with the foreign power the diplomat represents . . . or the regime meets the demands of the kidnappers and the diplomat is set free; then the army and the police criticize the leniency of the Government, and that creates dissension within the regime.

De Gramont, *How One Pleasant, Scholarly, Young Man From Brazil Became a Kidnapping, Gun-Toting, Bombing Revolutionary*, N.Y. Times, Nov. 15, 1970, § 6 (Magazine), at 43, 140.

16. N.Y. Times, Sept. 6, 1969, at 1, col. 6.

17. *Id.*, Dec. 31, 1970, at 1, col. 1.

18. *Id.*, Feb. 22, 1971, at 4, col. 4.

19. *Id.*, Mar. 4, 1971, at 9, col. 1.

20. *Id.*, Aug. 11, 1970, at 1, col. 2.

kidnapped and subsequently executed John Patrick Egan, the United States Consul in Córdoba, Argentina, when the Argentine Government refused to display four captured Montoneros on national television.²¹

The kidnapping of the OPEC oil ministers in Austria in December 1975, the May 1975 kidnapping of students in Tanzania, and the numerous kidnappings in Argentina also reveal the difficulties which arise when one attempts to apply the norms of state responsibility in the terrorism context.

In regard to the kidnapping of the OPEC ministers in Vienna,²² several grounds upon which liability arguably might be imposed are present. For instance, under presently accepted rules of state responsibility, could Austria be held liable for the injuries and damages caused by the terrorists solely because the act took place within its borders? In short, does a rule of strict or absolute liability apply in such a case, or does the duty vary with the circumstances and the status of the victims under international law? Additionally, or alternatively, could Austria be held liable for failure to give adequate protection to aliens, particularly aliens who were diplomatic personnel?²³ The alleged leader of the terrorist group was Illich Ramirez Sanchez, commonly known as "Carlos"; although more tenuous, would the fact that authorities throughout Europe knew that he had been involved in past terrorist killings be sufficient grounds upon which to impose liability on Austria, on the theory that by negligently admitting him the country had breached its duty to prevent the occurrence?²⁴

With respect to the kidnapping of students in Tanzania, of what importance to the responsibility issue is it that the act took place in a

21. *Id.*, Feb. 27, 1975, at 2, col. 5.

22. On 21 December 1975, six terrorists, calling themselves the Arm of the Arab Revolution, seized the OPEC headquarters in Vienna, killing three persons and taking 60 hostages. *Id.*, Dec. 22, 1975, at 1, col. 8. After flying from Vienna to Algiers, then to Tripoli and back to Algiers, the terrorists surrendered. *Id.*, Dec. 23, 1975, at 1, col. 1. Austria sought to have the terrorists extradited for murder and kidnapping, but since it had no extradition treaty with Algeria its attempt was unsuccessful. *Id.*, Dec. 30, 1975, at 4, col. 1. According to press reports, Algeria finally released the terrorists to a friendly Arab country. *Id.*, Dec. 31, 1975, at 24, col. 3.

23. According to press reports, Austria provides OPEC officials with police protection, but at least until December 1975 the protection was negligible. *Id.*, Dec. 22, 1975, at 10, col. 4.

24. According to press reports, "Carlos" was spotted in Belgrade, Yugoslavia, in early September 1976. Although sought by 12 countries in connection with the kidnapping of the OPEC oil ministers and various other terrorist activities, Yugoslavia made no attempt to apprehend him. *Id.*, Sept. 17, 1976, § A, at 3, col. 4.

remote region of that country?²⁵ Moreover, for purposes of applying international norms, does it matter that the kidnappers were a group of insurrectionists rather than just a gang of adventurers?

As for the Argentine terrorist incidents, does that country incur liability just because numerous officials of foreign corporations have been kidnapped and held for ransom within its borders?²⁶ Is any such liability lessened by the fact that the country has been undergoing a period of political turmoil? Does the fact that past experience suggests a strong likelihood that in the future other persons will be seized for ransom alter the nature of the government's duty or put it on constructive notice? Is the fact that the government has prior notice—either general or specific—that an injurious act may occur of any significance?

This section of the article attempts to answer these and other questions by analyzing and applying the state responsibility principles which are relevant to incidents of local terrorism. The succeeding section attempts a similar analysis in the context of nonlocal terrorism.

1. *The duty to prevent injuries to aliens: general principles*

Although presaged by many international arbitral decisions, the *British Property in Spanish Morocco Case*²⁷ is a logical touchstone for defining the duty to prevent occurrences such as terrorist acts. This arbitral decision is useful not only because of its relative historical proximity, but also for the cogency of the statements made by the arbitrator, Dr. Max Huber. In attempting to establish an overarching jurisprudential theory to deal with such cases, Huber flatly rejected imposing upon states liability *per se* for the acts of individuals. He sought to draw a clear distinction between a state's duty arising from the acts of individuals and acts in which the participation of the state

25. In late May 1975, a Marxist group from Zaire seized three American students and a Dutch woman, demanding \$460,000 in ransom, a supply of weapons, and the release of two rebels. *Id.*, May 22, 1975, at 2, col. 4; *id.*, May 27, 1975, at 8, col. 3. The kidnappers eventually released all the hostages, the last one after his employer, Stanford University, had paid a \$40,000 ransom. *Id.*, July 28, 1975, at 2, col. 4.

26. Among the corporate officials kidnapped, Charles A. Lockwood, a 66-year-old British-born executive, had the misfortune of being twice a victim. In 1973 he was released after 54 days upon the payment of \$1 million. In 1975, when he was seized again, the police successfully rescued him. *Id.*, Sept. 1, 1975, at 3, col. 4. Perhaps the largest ransom in Argentina was the \$60 million paid for the Born brothers, heirs to one of the largest Argentine fortunes, who were kidnapped by the Montoneros on 19 September 1974. *Id.*, June 19, 1975, at 5, col. 1; *id.*, June 21, 1975, at 3, col. 1.

27. 2 R. Int'l Arb. Awards 615 (1925).

could be demonstrated. Concerning the duty to prevent injuries to aliens, he observed that

[a State] may nevertheless be responsible for what the authorities do or fail to do in order, as far as possible, to avert the consequences of such acts. Responsibility for the action or inaction of the public authorities is quite different from the responsibility for acts imputable to individuals outside the influence of or openly hostile to the authorities [Nevertheless, the] State is obliged to exercise a certain vigilance²⁸

In Huber's view, the imposition of state responsibility for failure to prevent an injury is linked integrally to the actions or inactions of state authorities. If the opportunity to prevent the injury presents itself and the authorities "clearly"²⁹ neglect to take action, then the responsibility of the state is engaged. The state, however, would be allowed to explain why it did not take preventive measures. The assessment of whether a state fulfilled its duty, of course, would be made on the basis of the factual setting in which the injury occurred. As far as Huber was concerned, absent actual state involvement a demonstration of negligence was needed before responsibility would be imposed.

The emphasis which Huber placed upon separating the acts of individuals from acts involving state participation was reinforced by an incident which occurred in Florence in October 1925. According to reports, a "popular demonstration" led to a spontaneous attack on a building in which Marshall Cutler, a United States citizen, maintained an office.³⁰ As a result, the furnishings were destroyed. Among the notes exchanged between the United States and Italian governments, one from the Italian Minister of Foreign Affairs, dated 28 January 1927, stated:

[T]he Royal [Italian] Government holds . . . itself obligated, not absolutely to prevent certain occurrences from taking place, but to exercise in order to obviate them *ordinary vigilance* for the protection of foreigners and citizens alike [T]he juridical responsibility of a State may be raised only when: (1) the damage has been caused by the State itself; (2) it is in consequence of an illicit act by the State; (3) it is imputable to the State.³¹

28. *Id.* at 642 (authors' translation).

29. *Id.* (authors' translation).

30. 5 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 658-60 (1943).

31. *Id.* at 659-60 (emphasis added). In support of its position, the Italian Government cited Anzilotti, *La Responsabilité internationale des Etats à raison des dommages souf-*

Thus, inasmuch as the authorities in Florence had no opportunity to prevent the damage, Italy took the position that it could not be held responsible. The Department of State accepted this view, instructing the United States Embassy in Rome that the claim should not be pursued unless it could be shown that "the authorities had knowledge, or should have had knowledge of the impending attack and failed to take proper precautions to thwart it" ³² As that standard of proof could not be met, it was impossible to impose responsibility on Italy.

Although carrying much less weight as evidence of international law, it would be a mistake to overlook in this context the various attempts to codify the principles of state responsibility. At a minimum, such attempts are useful restatements of the gist of international arbitral experience and state practice. The work of the Hague Conference in 1930, sponsored by the League of Nations, stands out among these efforts. It is the richest source of data on the subject of state responsibility for injuries to aliens, principally because a large number of states took an active part in the preparation of the documentation.

Two "Bases for Discussion," numbers 10 and 17, are relevant to the subject of the duty to prevent injuries to aliens. Basis for Discussion Number 10 stated:

A State is responsible for damage suffered by a foreigner as a result of failure on the part of the executive power to show such diligence in the protection of foreigners as, having regard to the circumstances and the status of the person concerned, could be expected from a civilized

ferts par des étrangers, 13 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 285, 291 (1906) [hereinafter cited as R.G.D.I.P.], and 1 P. FAUCHILLE, TRAITE DE DROIT INTERNATIONAL PUBLIC 515 (1922). Also relevant is Vattel, who observed that since it was "impossible for the best regulated State, or for the most watchful sovereign, to regulate at will all the acts of their subjects, and to confine them on every occasion to the most exact obedience, it would be unjust to impute to the Nation or the sovereign all the faults of its citizens." 2 E. DE VATTEL, LAW OF NATIONS, ch. 6, § 73 (C. Fenwick trans. 1916).

32. 5 G. HACKWORTH, *supra* note 30, at 660-61. France appears to impose a somewhat higher duty upon a state for the protection of foreign nationals. In response to questions raised concerning the assassination of French nationals in Morocco, the Secretary of State for Foreign Affairs remarked:

On each occasion, we have insisted on the responsibility of the Government, not so much because of any direct complicity on its part as because of the elementary duty incumbent upon any independent Government to maintain order in its territory.

3 A. KISS, RÉPERTOIRE DE LA PRATIQUE FRANÇAISE EN MATIÈRE DE DROIT INTERNATIONAL PUBLIC 636 (1965) (authors' translation).

State. The fact that a foreigner is invested with a recognized public status imposes upon the States a special duty of vigilance.³³

Basis for Discussion Number 17 took a slightly different position:

A State is responsible for damage caused by a private individual to the person or property of a foreigner if it has failed to show in the protection of such foreigner's person or property such diligence as, having regard to the circumstances and to any special status possessed by him, could be expected from a civilized State.³⁴

During the Hague Conference, these texts were merged into one which would have imposed liability on a state "if it has failed to take such preventive . . . measures as in the circumstances might properly be expected of it."³⁵ This formulation eventually was shelved, however, in favor of one which provided that states were to be responsible for damage to foreigners when it resulted "from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to prevent . . . the acts causing the damage."³⁶ The shift from a specific mention of "due diligence" to a more generalized statement of the duty owed is readily apparent. In the end, however, even this general formulation failed to be adopted.³⁷

Under the authority of United Nations General Assembly Resolution 799,³⁸ the International Law Commission, twenty-five years after

33. League of Nations Publication, L.N. Doc. C/75/M/69 at 67 (V. Legal 1929).

34. *Id.* at 96.

35. 4 Acts of the Conference for the Codification of International Law 143 (Minutes of the Third Committee, League of Nations), L.N. Doc. C/351(c)/M/145(c) (V. 1930).

36. *Id.* at 175.

37. Prior to the 1930 Hague Conference, Professor Borchard and his colleagues on the Harvard Research in International Law Project formulated their views as to the form that the codification of principles of state responsibility should take. Article 10 of this draft convention reads in relevant part:

A state is responsible if any injury to an alien results from its failure to exercise due diligence to prevent the injury, if local remedies have been exhausted without adequate redress for such failure. The diligence required may vary with the private or public character of the alien and the circumstances of the case.

Harvard Research in International Law Project, *Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. SPEC. SUPP. 133, 187 (1929). According to the comment to the article, in ascertaining whether a state has acted with "due diligence," consideration must be given to whether the state had the power to take preventive measures and also whether the opportunity to do so presented itself. See also Hackworth, *Responsibility of States for Damages Caused in Their Territory to the Persons or Property of Foreigners*, 24 AM. J. INT'L L. 500, 513 (1930).

38. 8 U.N. GAOR, Supp. (No. 17) 52, U.N. Doc. A/2630 (1953).

the failure of the Hague Conference, also attempted to codify the principles of state responsibility. Article 7 of the final draft of its Special Rapporteur, Dr. Garcia-Amador, contains one of the more detailed explications of the duty of preventing injuries to aliens:

1. The State is responsible for the injuries caused to an alien by illegal acts of individuals, whether isolated or committed in the course of internal disturbances (riots, mob violence or civil war), if the authorities were manifestly negligent in taking measures which, in view of the circumstances, are normally taken to prevent the commission of such acts.
2. The circumstances mentioned in the foregoing paragraph shall include, in particular, the extent to which the injurious act could have been foreseen and the physical possibility of preventing its commission with the resources available to the State.³⁹

Garcia-Amador took the view that it was impossible to reduce the rule of "due diligence" to a single, simple definition which could be used as an objective standard in all cases. He was convinced, as his draft article indicates, that the standard imposed should be considered in light of the varying circumstances of each case.⁴⁰ Although the International Law Commission did not adopt Garcia-Amador's draft, his formulations nevertheless remain useful.

At the same time, pursuant to the request of the United Nations Secretariat, Professors Sohn and Baxter began revising the rules of state responsibility drafted by Professor Borchard in 1929 as part of the Harvard Research in International Law Project.⁴¹ The language used in article 13(1) of their draft convention also is relevant to this survey of attempts to codify principles of state responsibility:

Failure to exercise due diligence to afford protection to an alien, by way of preventive or deterrent measures, against any act wrongfully com-

39. [1961] 2 Y.B. INT'L L. COMM'N 47, U.N. Doc. A/CN.4/134 + Add. 1. Garcia-Amador prepared six drafts with explanations on "The Responsibility of States for Damage Caused to the Person or Property of Aliens." These drafts may be found in: [1956] 2 Y.B. INT'L L. COMM'N 173, U.N. Doc. A/CN.4/96; [1957] 2 Y.B. INT'L L. COMM'N 104, U.N. Doc. A/CN.4/106; [1958] 2 Y.B. INT'L L. COMM'N 47, U.N. Doc. A/CN.4/111; [1959] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/119; [1960] 2 Y.B. INT'L L. COMM'N 41, U.N. Doc. A/CN.4/125; [1961] 2 Y.B. INT'L L. COMM'N 1, U.N. Doc. A/CN.4/134 + Add. 1.

40. See [1957] 2 Y.B. INT'L L. COMM'N 122, U.N. Doc. A/CN.4/106, reprinted in F. GARCIA-AMADOR, L. SOHN & R. BAXTER, RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 27 (1974) [hereinafter cited as CODIFICATION]. Professor Borchard, before Garcia-Amador, had also warned that "the standard of treatment which an alien is entitled to receive is incapable of exact definition." E. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD v (1915).

41. See note 37 *supra*.

mitted by any person, acting singly or in concert with others, is wrongful:

- (a) if the act is criminal under the law of the state concerned; or
- (b) the act is generally recognized as criminal by the principal legal systems of the world.⁴²

The comment to the article makes it clear that the posited rule would not impose responsibility in all circumstances; the foreseeability of the risk would be one of several determinative factors.⁴³ The Sohn and Baxter draft convention, while never more than an academic exercise, also remains a useful formulation of state responsibility law today.

More recently, the International Law Commission appointed Dr. Roberto Ago Special Rapporteur in yet another attempt to formulate rules on state responsibility. In article 11 of his draft proposal, states would have been responsible for acts of individuals where they "ought to have acted to prevent or punish the conduct of the individual or group of individuals and failed to do so."⁴⁴ Although in the revised text adopted by the International Law Commission the draft language has been considerably weakened, according to Ago's commentary the revision does not undercut the traditional norms imposing responsibility upon a state for the acts of individuals when the state has not lived up to its international obligations to prevent such acts.⁴⁵

The above cursory survey of statements regarding the liability of states for failure to prevent injuries to aliens is sufficient to permit the following generalizations concerning the basic nature of their duty under international law. First, a duty to afford protection to aliens exists. The duty, however, is not absolute: a state is not responsible for every injury suffered by an alien within its borders. Second, a distinction is made between the acts of individuals and acts of the state. A state is responsible for the acts of individuals only when it has failed to fulfill its international obligations to prevent such acts. Third, for a state to incur responsibility it must be shown that, under

42. L. SOHN & R. BAXTER, CONVENTION ON THE INTERNATIONAL RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS 134 (Draft No. 12 with Explanatory Notes 1961) [hereinafter cited as L. SOHN & R. BAXTER, CONVENTION].

43. *Id.* at 136-37. See also CODIFICATION, *supra* note 40, at 236-37. For a brief review of post-World War II attempts to codify rules of state responsibility, see Lillich, *Toward the Formulation of an Acceptable Body of Law Concerning State Responsibility*, 16 SYRACUSE L. REV. 721 (1965).

44. Ago, (*Fourth*) Report on State Responsibility, [1972] 2 Y.B. INT'L L. COMM'N 126, U.N. Doc. A/CN.4/264 + Add. 1 (1972).

45. Report of the International Law Commission to the General Assembly, 30 U.N. GAOR, Supp. (No. 10) 21-34, U.N. Doc. A/10010/Rev. 1 (1975).

the circumstances of the particular case, the state failed to maintain the required level of vigilance or "due diligence" to prevent the injury.⁴⁶

2. *The duty to prevent acts of local terrorism*

The sources considered in the preceding subsection are helpful in establishing the general theory relating to the duty to prevent injuries to aliens. Additionally, a few "cases" exist which not only recognize this duty, but apply it to situations involving acts of local terrorism.⁴⁷ The most useful precedent is the *Chapman Case*,⁴⁸ decided by the General Claims Commission (United States and Mexico). It is relevant as much for its factual similarity to a contemporary terrorist act as for the statement of law which it contains.

In the summer of 1927, the United States Embassy in Mexico City was informed that if Massachusetts executed Sacco and Vanzetti it would mean the death of all United States officials in Mexico. Chapman immediately transmitted this information to all the appropriate Mexican officials, including the Governor of Vera Cruz, the Chief of the State Police, and the Municipal President in Puerto, Mexico, where Chapman served as consul. The Municipal President went as far as to issue instructions to the local police that precautions be taken to ensure Chapman's safety. Despite the fact that Chapman himself spoke to the police and other local officials about the threat, they took no steps to provide additional protection. In the hours just before dawn on 17 July 1927, a masked gunman entered the Consulate and shot Chapman in the chest, seriously wounding him.

In awarding Chapman compensation for the injury, the Commission stated:

46. Although different terminology has been employed to characterize the standard of care required by international law, *see* text accompanying notes 27-45 *supra*, the phrase most commonly invoked has been "due diligence." *See, e.g.*, text accompanying note 12 *supra*. While the due diligence concept cannot be reduced to a blackletter rule, it can be said to impose upon states a duty somewhat higher than mere absence of negligence. *See* note 136 & accompanying text *infra*.

47. Local terrorism is used in this article to describe acts of terrorism which originate and are executed within the territorial boundaries of one state. For definitions of other terms used in this article, *see* note 1 *supra*.

48. *Chapman Case* (United States v. Mexico), [1930] Opinions of Commissioners 121, 4 R. Int'l Arb. Awards 632 (1930) [hereinafter Opinions of Commissioners will be cited as Opinions]. In its decision, the General Claims Commission (United States and Mexico) distinguished this case from cases like the *Home Missionary Society Case* (United States v. Great Britain), where the issues raised concerned providing protection in points far removed on a few hours notice and the protection required to be provided in cases involving acts of insurgents. *Id.* at 128, 4 R. Int'l Arb. Awards at 637.

A warning of imminent danger was communicated to Mexican authorities in the instant case. One official evidently took note of the warning and issued suitable instructions to meet the situation. These instructions were not carried out In light of the facts revealed by the record and in accordance with the applicable principles of law, the Commission is constrained to sustain the charge of lack of protection made by the United States in this case.⁴⁹

Over the years, the proposition that an especially high duty of care should be imposed with regard to the protection of persons having special international status⁵⁰ has been recognized.⁵¹ There are, of course, a myriad of incidents substantiating this view; *Chapman* is just one of them. Of the other cases, however, only a few are helpful to the present inquiry. Among them the *Janina* and *Worowski* incidents are the most richly documented and thus will be used as the basis of the following analysis. The *Janina* incident provoked discussions at high levels within the League of Nations, while the *Worowski* incident involved correspondence between the Soviet Union and Switzerland on the diplomatic level.

The *Janina* incident stemmed from the assassination by unknown persons of the Tellini mission on 27 August 1923. The task of this mission was to establish the international border along the Greek-

49. *Id.* at 129, 4 R. Int'l Arb. Awards at 639. Cf. the Ermerins Case (United States v. Mexico), [1929] Opinions 219, 4 R. Int'l Arb. Awards 476 (1929), where an award was made to a consular agent on facts similar to the *Chapman* Case. Ermerins was acting as the Consular Agent for the United States at Puerto, Mexico. In 1914, because of a hostile attitude on the part of the Mexicans toward United States nationals in the town, a cablegram was sent to Ermerins by the United States Department of State, requesting him to return to the United States. The cablegram was intercepted by a censor of the Mexican Government, but Ermerins was notified of the danger and was able to escape. The next day his house was found looted. Since the house was located directly across the street from the local police headquarters, the Commission decided that a crime of this nature could not have taken place if the authorities of the town had properly fulfilled their duty to the property of Ermerins, which they must have known would be exposed to danger under the circumstances prevailing at the time.

50. See note 14 *supra*.

51. *Mallén* Case (Mexico v. United States), [1927] Opinions 254, 257, 4 R. Int'l Arb. Awards 173, 175 (1927). In *Mallén* the Commission ruled that the host government should exercise greater vigilance in respect to the safety and security of a foreign consul than is extended to common citizens. The case resulted from two separate assaults on Francisco *Mallén*, a Mexican Consul, by one Franco, a citizen of El Paso, Texas. Franco was convicted following the first assault and was given a nominal fine. Shortly thereafter, Franco was appointed deputy constable of El Paso. Within a few months, a second, more serious assault was made upon *Mallén* by Franco. The commissioners believed Franco's appointment as deputy constable to be improper following his conviction for the first assault.

Albanian frontier. The Italian and Greek Governments were principal parties to the discussions which followed. Greece, while swift in denying any responsibility for the acts themselves, did offer compensation from the outset. For purposes of examining the duty to prevent injuries to aliens, the initial attitude of the Italian Government is of interest because it departed from the usual state responsibility norms. Italy, while failing to mention any dereliction on the part of the Greek authorities in preventing the crimes, made clear its belief that responsibility arose solely from the fact that the incident had occurred on Greek soil.⁵²

When Italy moved to occupy Corfu,⁵³ Greece asked that the Council of the League of Nations take up the entire matter. At a meeting of the Council in early September, Dr. Politis, the Greek representative, took issue with the legal position adopted by Italy and contended that Greece was not responsible absent proof of misconduct by Greek officials.⁵⁴ At the same time, the Conference of Ambassadors requested that Greece thoroughly investigate the circumstances surrounding the death of General Tellini and his associates. Greece replied by proposing that an international commission conduct the inquiry. In a telegram accepting the Greek proposal, the Conference of Ambassadors made a statement which, while lending support to Italy, also created substantial confusion as to the governing principles of international law. The telegram stated that "it is a principle of international law that States are responsible for political crimes and outrages committed within their territory."⁵⁵

The conflict between the two countries was settled within a month; indemnity monies were set aside should the individuals actually responsible for the crimes not be found. The position adopted by the Italians, and perpetuated by the Conference of Ambassadors, however, misstated the principles applicable to these types of incidents. Only later, when a special Committee of Jurists released its opinion as to the proper rule of international law in such matters, was the doctrine set right. According to the Committee of Jurists:

The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime The recognized public character of a foreigner and the

52. 11 LEAGUE OF NATIONS O.J. 1412-13 (1923).

53. See generally J. BARROS, THE CORFU INCIDENT OF 1923 (1965).

54. See 11 LEAGUE OF NATIONS O.J. 1287-89 (1923).

55. *Id.* at 1294.

circumstances in which he is present in its territory entail upon the State a corresponding *duty of special vigilance* on his behalf.⁵⁶

The *Worowski* incident occurred several months before the *Janina* incident but took considerably longer to settle. *Worowski*, the Soviet envoy to the Lausanne Peace Conference, was shot and killed on 10 May 1923. The Swiss police arrested a man named *Conradi* immediately. In a telegram dated May 16th, the Soviet Government made clear their interpretation of the incident: "The last communications from *Worowski* have proved beyond any doubt that the Swiss authorities completely neglected to take the most elementary precautionary measures to protect the Russian delegate and his colleagues."⁵⁷ Switzerland explained the behavior of its police by indicating that *Worowski* had not asked for special protection—indeed, he had not been invited to the conference, but had come unofficially—and that they had taken sufficient precautionary measures, even to the extent of "admonishing" some Swiss citizens who had been "urging" the Soviet delegation to leave Lausanne. Moreover, the Swiss argued that they had no information that would have led them to the conclusion that they were dealing with a potential murder of a foreign delegate.

The Swiss position, however, was not always so dispassionately presented. In one rather warmly-worded message, the Swiss authorities indicated that *Conradi* had stated that he was seeking to avenge the inhumane treatment that his family had suffered in the Soviet Union. Indeed, they contended that Switzerland had the right to demand damages for the "violence and plunder" which the Soviets had committed against Swiss citizens in the Soviet Union.⁵⁸

After *Conradi*'s trial and acquittal in November 1923, three years passed before another official reference was made to the *Worowski* incident. The Soviets, through Commissioner of Foreign Affairs Chicherin, revived the debate. In a letter of 7 April 1926 he charged that the Swiss:

although warned in good time of the threats openly made in extremist circles against M. *Worowski*, the Soviet delegate, not only took none of

56. 4 LEAGUE OF NATIONS O.J. 524 (1924) (emphasis added). A summary of the incident may be found in Ago, *supra* note 44, at 114-15.

57. K. FURGLER, GRUNDPROBLEME DES VÖLKERRECHTLICHEN VERANTWORTLICHKEIT DER STAATEN UNTER BESONDERER BERÜCKSICHTIGUNG DER HAAGER KODIFICATIONS-KONFERENZ, SOWIE DER PRAXIS DER VEREINIGTEN STAATEN UND DER SCHWEIZ 58-61 (1948). For a summary of the incident, see Ago, *supra* note 44, at 115-17.

58. See K. FURGLER, *supra* note 57, at 59-60.

the necessary steps to prevent the crime but, once the crime had been committed, did all in [their] power to allow the criminals to escape with impunity.⁵⁹

The incident finally was settled in 1927 by a joint declaration of the Soviet and Swiss Governments in which the latter agreed "to grant Mr. Worowski's daughter material assistance" pending negotiations between the two countries.⁶⁰

The Worowski incident is enlightening not so much for the difference between the governments as to which principles of international law should apply, but for the different views taken by the respective governments with regard to the facts. This divergence of views shaped each state's interpretation of whether the duty to prevent the injury had been met. Similar divergences occur today in the context of terrorism, where one side claims that the facts demonstrate dereliction while the other side argues that they do not.⁶¹ The Worowski incident is all the more useful as an example of the tension that may develop between states whose political philosophies and systems differ—not unlike what may be the norm in contemporary cases of terrorism.

Insofar as this article is concerned, one of the particularly important features common to the *Chapman*, *Janina*, and *Worowski* "cases" is the fact that in each one the state within whose territory the injury occurred paid compensation,⁶² despite varying interpretations about the significance of such payment. In *Chapman*, Mexico was held responsible by an international tribunal for its failure to provide adequate protection. In the *Janina* and the *Worowski* incidents, the nexus between the payment of monies and the possible responsibility of the state involved was less clear, and indeed the payments may be construed to have been *ex gratia*.

3. Degrees of state involvement in local terrorism

Obviously, state responsibility for the acts of individuals must be determined on a case-by-case basis. Nevertheless, state responsibility for breach of the duty to prevent injuries to aliens may be viewed as

59. *Id.* at 60.

60. *Id.* at 61.

61. The *Alabama Claims* arbitration is another example of two governments agreeing to the applicable principles of law, but disagreeing whether the facts of the case established a breach of the duty flowing from the agreed upon principles. See notes 132-41 & accompanying text *infra*.

62. See text accompanying notes 49, 55-56, 60 *supra*.

sort of a continuum varying according to the relationship of the state to the individuals causing the injuries. At one extreme, and at places in between, circumstances may exist under which a state would be held responsible for its failure to prevent such acts. That certainly would include cases which involve complicity on the part of the state in the form of actual involvement; it also might include either toleration of or failure to suppress the activities of private individuals which threaten aliens. As in any continuum, the distinctions between negligence in preventing such activity and complicity with its perpetrators may blur as one fades into the other. Huber, in assessing the reasonableness of the activities of the police in the *Ziat, Ben Kiran Case*,⁶³ captured this distinction well: "If, besides, no action had been taken for three whole hours, a case of negligence bordering on complicity would exist."⁶⁴ At the other extreme of the continuum, the state may be free from complicity, or circumstances may be found under which it could not be held responsible for failing to prevent the injury.

In short, state responsibility may be predicated upon either complicity or negligence. The first principally involves some sort of activity on the part of the state which facilitates the injury. The second essentially involves an omission, a failure to fulfill a duty. The end result is the same: the imposition of state responsibility. What differs are the assumptions one makes in assessing responsibility. The first assumes active or passive state involvement in the terrorist activities. The second assumes the lack of state involvement at any level, the inquiry centering solely on whether the state has failed to live up to its duty to prevent the injury.

63. Personal Claim No. 53, *Ziat, Ben Kiran*, in the British Property in Spanish Morocco Case, 2 R. Int'l Arb. Awards 615, 731 (1925).

64. *Id.* The *Janes Case* also dealt with the issue of the state's derivative liability. In that case, the commission stated:

At times international awards have held that, if a State shows serious lack of diligence in apprehending and/or punishing culprits, its liability is a derivative liability, assuming the character of some kind of complicity with the perpetrator himself and rendering the State responsible for the very consequences of the individual's misdemeanor The reasons upon which such finding of complicity is usually based in cases in which a Government could not possibly have prevented the crime, is that the nonpunishment must be deemed to disclose some kind of approval of what has occurred, especially so if the Government has permitted the guilty parties to escape or has remitted the punishment by granting either pardon or amnesty.

James Case (United States v. Mexico), [1927] Opinions 108, 114, 4 R. Int'l Arb. Awards 82, 86-87 (1927). See notes 230-34 & accompanying text *infra*.

a. Support, toleration, and involvement re local terrorism

Inasmuch as a state's duty to prevent injuries to aliens is well-established, it follows that a state breaches its duty if it supports, tolerates, or encourages activities which promote terrorism within its borders directed at aliens.⁶⁵ No citation is necessary to support the proposition. What needs explanation is a more puzzling matter, namely, why would a state seek to promote terrorism within its own borders? The question is not entirely inapposite. While the vast majority of cases of local terrorism are not the sort in which a state would be involved—as would be the case with nonlocal terrorism which will be discussed below⁶⁶—one can conceive of instances in which a state would permit acts tantamount to local terrorism in order to achieve some sort of political impact relating to its foreign interests. Where the domestic design of a state is to make life difficult for aliens, and this objective is accomplished in part by terrorism, such activities surely run afoul of the traditional principles of state responsibility.

i. Involvement of government personnel

Given the nature of terrorism, it is not unlikely that from time to time individuals who occupy government positions will sponsor or encourage other individuals in private life to commit terrorist acts.

One of the early decisions to grapple with the problem of complicity between terrorists and government officials is the *Glenn Case*,⁶⁷ a claim presented to the Commission established under the Convention of 4 July 1868 between the United States and Mexico.⁶⁸ The claimant, a widow, alleged that Mexican soldiers acting under orders of a certain sergeant and corporal had murdered her husband and son and carried away their bodies. Those two soldiers, in turn, allegedly were acting under the instructions of a Deputy of the National Congress. Failing to find sufficient proof to show the actual involvement of the

65. Needless to say, a state directly involved in terrorist activities has breached its duty too. "The participation of authorities of the state is conclusive proof of failure of the state to use the means at its disposal for preventing the injury." C. EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 92 (1928).

66. See text accompanying notes 119-214 *infra*.

67. *Glenn Case* (United States v. Mexico), U.S. AND MEXICAN CLAIMS COMMISSION, FINAL REPORT OF THE AGENT OF THE UNITED STATES AND SCHEDULE OF CLAIMS 1877, at 20-21 (1877); 3 J.B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 3138 (1898) [hereinafter cited as ARBITRATIONS].

68. 9 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 826 (1972).

Deputy, and treating the acts of the sergeant and corporal as acts of ordinary individuals despite their having acted under color of their authority, the Commission nevertheless held Mexico responsible for the denial of justice arising from the failure of judicial authorities to bring to trial those persons who had committed the murders.⁶⁹

The Italian-Venezuelan Commission, created by the Protocols of 17 February and 7 May 1903,⁷⁰ took up the same problem in the *Poggioli Case*.⁷¹ It is a more useful precedent than *Glenn* because the local authorities were found to have acted in concert with criminals who had pillaged the Poggioli plantation and driven off employees while the Poggioli brothers were in jail for having refused to surrender their animals to the Army without compensation. An element of "connivance" on the part of local government officials pervades the facts of the case. Indeed, persons involved in the attacks on the plantation, which included attempts to murder one of the owners, were permitted to commit further offenses despite requests from higher officials that they be arrested. The local authorities facilitated the activities of the attackers by warning them whenever they were in danger of arrest, enabling them to hide until the danger of arrest had passed. Moreover, the animosity of the local authorities toward the victims for having refused to surrender their animals was patent. As a result, the authorities permitted the culprits free reign in committing offenses against the brothers.

The collusion between the local authorities and those persons directly involved in the attacks gave rise to state responsibility. The Italian-Venezuelan Commission went so far as to conclude:

that when the authorities of the State of Los Andes have acted in apparent conjunction with criminals, and have with them and under the circumstances heretofore detailed joined in the commission of offences against private individuals, and no one has been punished therefor and no attempt made to insure punishment, the act has become in a legal sense the act of the government itself.⁷²

69. See notes 281-320 & accompanying text *infra*.

70. Protocol of Feb. 17, 1903, 12 C. BEVANS, *supra* note 68, at 1101; Protocol of May 7, 1903, 2 W. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1776-1909, at 1872 (1910).

71. *Poggioli Case* (Italy v. Venezuela), 10 R. Int'l Arb. Awards 669 (1903); J. RALSTON, VENEZUELAN ARBITRATIONS OF 1903, at 847 (1904). See also *Youman Case* (United States v. Mexico), [1927] Opinions 150, 4 R. Int'l Arb. Awards 110 (1927), where soldiers were sent to quell a mob, but instead joined in the riot and killed three United States citizens.

72. 10 R. Int'l Arb. Awards at 689; J. RALSTON, *supra* note 71, at 869. In Borchard's

Under the facts of *Poggioli*, therefore, it was not inappropriate to speak of "complicity" on the part of the state. The local authorities had involved themselves not only in the commission of crimes, but also in attempts to insulate the parties committing such crimes from arrest and prosecution. State responsibility, then, arose in the case for three interrelated reasons: first, failure to provide protection for the victims; second, failure to punish those persons responsible; and third, failure to prevent them from committing further offenses.

The *Glenn* and *Poggioli* cases illustrate how the state responsibility issue has been resolved where allegations have been made that state officials have been involved in the injury. Where the evidence fails to connect the acts of the officials with the acts of the individuals, state responsibility for actual involvement in the injury has not been found. As *Glenn* shows, however, rather than stress the failure to prevent the injury as a basis for responsibility, the focus may center on the failure to bring the responsible parties to justice. Moreover, there is a tendency to regard government personnel acting on their own as ordinary individuals—a matter which will be discussed more fully below.⁷³ In short, wherever there has been evidence sufficient to show a clear connection between the acts of government officials and the acts of the individuals, at least to the extent that the state has facilitated or participated in the injury, responsibility has been imposed upon the state. In a situation like *Poggioli*, it is not so much the ratification or passive tolerance of the illegal acts of individuals as the actual participation by government officials in the injurious conduct that gives rise to state responsibility.

ii. Acquiescence in terrorism

A handful of incidents can be found among state practice and the decisions of arbitral tribunals which show how state responsibility may arise from the acquiescence of states in the activities of ordinary individuals. In the *Baldwin Case*,⁷⁴ the United States maintained that Mexico was responsible for failing in its duty to prevent the death of a mine superintendent. Responsibility ran to Mexico, the United

words, "[i]t is, of course, difficult to draw the line between personal and official acts . . . It is only when the government as an administrative system is so negligently constituted as to invite such wrongs, or fails to discipline the wrongdoing officer thereafter, thus indicating connivance, approval, or indifference, that international responsibility can be said to arise." *Recent Opinions of the General Claims Commission, United States and Mexico*, 25 AM. J. INT'L. L. 736 (1931).

73. See notes 264-335 & accompanying text *infra*.

74. *Baldwin Case* (United States v. Mexico), 1 M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 24 (1937) [hereinafter cited as WHITEMAN, DAMAGES].

States argued, because the circumstances indicated, *inter alia*, "an indifference amounting to an acquiescence in continued wrongdoing."⁷⁵ Baldwin had been murdered by a group of outlaws who previously had been implicated in the murder of other aliens. Despite this fact, the outlaws were left at large, free to mingle with the local population. Only when they killed a prominent local citizen was something done. Even then, it was a group of local citizens, not the local authorities, who tracked down the culprits and executed two of them. While it was the position of the United States that there was "acquiescence" in the continued illegal acts of the outlaws, the Mexican authorities, in making payment to Baldwin's widow under a special arrangement in 1894, were at pains to point out that their reparation for the incident was "not to establish a precedent" but was an act of "equity."⁷⁶

Great Britain's negotiations with Indonesia over injuries to British property in Jakarta during riots in 1963 also reveal the type of behavior on the part of government officials that will give rise to state responsibility. According to reports, the local authorities "had appeared to passively condone the actions of the mob."⁷⁷ As a result of discussions between the two governments, Indonesia, in a lump sum agreement dated 1 December 1966,⁷⁸ accepted responsibility for the claims and agreed to pay compensation up to a ceiling figure of £660,000. The settlement lends support to the principle that where a state passively tolerates acts injurious to private individuals it may be held responsible on the theory of failure to prevent the injury.

b. Negligence in failing to prevent local terrorism

As opposed to the problem discussed above of a state's actual involvement in promoting terrorism, the more common situation in which a state finds itself with respect to local terrorism surely must be not where it is an active or passive participant, but rather where it purports to suppress terrorist acts. The rudiments of the duty to prevent acts injuring the interests of aliens have been set out above.⁷⁹ As the following discussion will show, this duty has been described

75. *Id.* at 25.

76. *Id.*

77. Ago, *supra* note 44, at 113, citing [1963-II] BRITISH PRACTICE IN INTERNATIONAL LAW 120 (E. Lauterpacht ed. 1965).

78. [1967] Gr. Brit. T.S. No. 34 (Cmnd. 3277), 606 U.N.T.S. 125. See 2 R. LILLICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 336 (1975).

79. See text accompanying notes 47-62 *supra*.

variously as one of exercising "due diligence," or of maintaining "a certain vigilance," or as a duty to see that "all reasonable measures" are utilized for the suppression of crime. The remainder of the section discusses the effect of two variables on the duty to prevent injuries to aliens: the means available to the state to suppress the terrorist acts; and knowledge or notice on the part of the state as to the likelihood of terrorist activities occurring.

In order to analyze the duty to prevent injuries to aliens as applied to acts of local terrorism, it is helpful to examine decisions dealing with internal disturbances such as insurrection or rebellion. Terrorists do tend to be individuals who are, as Huber noted in discussing state responsibility for damages caused by popular demonstrations, revolutions, and wars, "outside the influence of or openly hostile to the authorities."⁸⁰ Thus, given the nature of the purposes which generate terrorist activity,⁸¹ the decisions dealing with internal disturbances such as insurrection or rebellion may contribute to the attempt to establish the limits of a state's responsibility for preventing local terrorism.

The *Sambiaggio Case*⁸² provides a good starting point. In establishing the criteria on which he decided the case, Ralston, the umpire, observed:

[T]he very existence of a flagrant revolution presupposes that a certain set of men have gone temporarily or permanently beyond the power of the authorities; and unless it clearly appear that the government has failed to use promptly and with appropriate force its constituted authority, it can not reasonably be said that it should be responsible for a condition of affairs created without its volition.⁸³

Ralston accepted the proposition that if it were proven that authorities of the Venezuelan Government had "failed to exercise due diligence to prevent damages from being inflicted by revolutionists, that country should be held responsible,"⁸⁴ but he ruled that in the claim before him no such proof had been presented. Indeed, one would have to look long and hard to find a case in which a state had been negligent in suppressing a rebellion against itself.⁸⁵ Thus, if

80. See 2 R. Int'l Arb. Awards 642 (1924).

81. See notes 14-15 & accompanying text *supra*.

82. *Sambiaggio* (Italy v. Venezuela), 10 R. Int'l Arb. Awards 499 (1903); J. RALSTON, *supra* note 71, at 679.

83. J. RALSTON, *supra* note 71, at 680.

84. *Id.* at 692.

85. Akehurst, *State Responsibility for the Wrongful Acts of Rebels—An Aspect of the Southern Rhodesian Problem*, 43 BRIT. Y.B. INT'L L. 49, 50 (1968-1969).

local terrorism is analogized to a revolution or insurrection, it may be equally difficult to place responsibility on the state, since it probably will be taking all the steps it can to suppress it.

A position similar to that taken by Ralston in the *Sambiaggo Case* was adopted in 1920 by the tribunal in the *Home Frontier and Foreign Missionary Society Case*.⁸⁶ The tribunal noted that a state was not to be held responsible for acts of insurrectionists unless a "breach of good faith" or "negligence" could be demonstrated in putting down the revolution.

Incidents involving mob violence have produced similar statements. The position adopted by the United States Government in the Florence incident of 1925⁸⁷ was reiterated in 1956 when mobs in Libya caused damage to the property of United States nationals. The United States refused to espouse their claims, saying:

[I]t may be pointed out in general that to establish the responsibility of a respondent government under principles of international law in cases of this character, it must be shown that the authorities failed to employ all reasonable means at their disposal to prevent the unlawful acts resulting in loss or injury to aliens⁸⁸

The instruction also states that "negligence" in suppressing the acts must be attributable to the authorities before a valid claim can be made.⁸⁹

For purposes of the imposition of state responsibility, the duty to prevent acts of terrorism naturally must be measured against the circumstances of each individual case. Where states do not have the means available to suppress such acts, it is difficult to establish that they have breached their duty.⁹⁰ Again, by comparing arbitral deci-

86. *Home Frontier and Foreign Missionary Society of the United Brethren in Christ Case* (United States v. Great Britain), [1920] Opinions 423, 6 R. Int'l Arb. Awards 42 (1920).

87. See text accompanying notes 30-32 *supra*.

88. 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 831 (1967) [hereinafter cited as WHITEMAN, DIGEST].

89. *Id.*

90. See L. SOHN & R. BAXTER, CONVENTION, *supra* note 42, at 137:

The means which a State has available to protect an alien must be taken into account. In a thinly populated area, it cannot be expected that large police forces can be mobilized in order to render safe those aliens who may wish to enter the area. It is, however, quite clear that a State must not stop at affording protection through police but must, if necessary, attempt to maintain order through the intervention of military forces as well. In sum, the duty of a State to afford protection may vary with the character of the territory in question in the very same manner that the acts necessary for the exercise of sovereignty may vary with the nature of the terrain, the population, and the degree of civilization of the area claimed.

sions and state practice, it is possible to see why this result is so. For example, in the *Home Missionary Society Case* one of the issues was whether a state was under a duty to prevent acts of insurgents on a few hours notice at points distant from the means of ensuring that protection would be given.⁹¹ The claim illustrates how the behavior acceptable to fulfill a state's duty varies according to the circumstances of the case; in remote areas, the standard of behavior is less rigorous since the state necessarily lacks the ability to provide much protection. Applying this reasoning to state responsibility for acts of local terrorism where there is no complicity on the part of the state, the standard of conduct should lessen as the site of the terrorist act becomes more remote from centers of power and authority.

A number of claims decided by the General Claims Commission (United States and Mexico) further illustrate this point. In the *Boyd Case*,⁹² where it was alleged that the Mexican authorities had failed to provide adequate protection, the Commission rejected the claim because the site of the murder was fifty miles from the nearest civil authorities and seventy miles from the nearest garrison. In addition, save for one other murder, the only crimes which had been committed prior to the murder of Boyd were of a minor nature. Even where a number of crimes had taken place in an area, as in the *Almaguer Case*,⁹³ the Commission took the view that a *prima facie* case did not exist; rather "it is necessary to consider the possibility of imparting protection, the extent to which protection is required, and the neglect to afford protection"⁹⁴ After considering the facts of the case, the Commission ruled that no responsibility should be imposed. Lastly, in the *Mead Case*,⁹⁵ while observing that "conditions in the locality . . . may reasonably be considered as warning as to the need for protection,"⁹⁶ the Commission took into account the "unusual difficulties" which were inherent in the facts, principally that the alleged-

91. [1930] Opinions 128, 4 R. Int'l Arb. Awards 637 (1930).

92. Boyd Case (United States v. Mexico), [1929] Opinions 78, 4 R. Int'l Arb. Awards 380 (1929).

93. Almaguer Case (United States v. Mexico), [1929] Opinions 291, 4 R. Int'l Arb. Awards 523 (1929).

94. *Id.* at 294, 4 R. Int'l Arb. Awards at 525.

95. Mead Case (United States v. Mexico), [1931] Opinions 150, 4 R. Int'l Arb. Awards 653 (1931).

96. *Id.* at 153, 4 R. Int'l Arb. Awards at 655. For instances where the claim of failure to provide protection failed, see Sturtevant Case (United States v. Mexico), [1930] Opinions 169, 4 R. Int'l Arb. Awards 665 (1930); Smith Case (United States v. Mexico), [1929] Opinions 208, 4 R. Int'l Arb. Awards 468 (1929); Stallings Case (United States v. Mexico), [1929] Opinions 224, 4 R. Int'l Arb. Awards 478 (1929); Santa Isabel Claims (United States v. Mexico), [1926] Opinions 1, 4 R. Int'l Arb. Awards 783 (1926).

ly wrongful act occurred eighty miles from the nearest garrison. In addition, the Commission found that the Mexican authorities were not totally indifferent to the situation. Although no responsibility was found for the failure to provide protection, the claims nevertheless were successful on the theory of failure to apprehend and punish the assailants.⁹⁷ This unifying feature of these three claims will be explored more fully below.⁹⁸

One other aspect of the duty to prevent terrorism remains to be discussed: that relating to knowledge or notice on the part of the state as to the likelihood of the occurrence of terrorist activities. As was suggested in the *Mead Case*, well-known conditions in an area may bespeak the need to provide protection to aliens. In the *Corfu Channel (Merits) Case*,⁹⁹ the International Court of Justice remarked in regard to state responsibility:

It is true, as international practice shows, that a State on whose territory or in whose waters an act contrary to international law has occurred, may be called upon to give an explanation. It is also true that that State cannot evade such a request by limiting itself to a reply that it is ignorant of the circumstances of the act and of its authors. The State may, up to a certain point, be bound to supply particulars of the use made by it of the means of information and inquiry at its disposal. But it cannot be concluded from the mere fact of the control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known, the authors.¹⁰⁰

However true it may be that a state may not be presumed to know the details of an act undertaken by ordinary individuals within its territory, the situation in a given country may be such that a state is put on special notice of the likelihood of terrorist attacks.

The "case law" has demonstrated that where a state is put on notice of a threatened injury and fails, under the circumstances, to take appropriate measures to prevent it, responsibility will arise.¹⁰¹

97. See notes 264-80 & accompanying text *infra*.

98. See notes 264-335 & accompanying text *infra*.

99. [1949] I.C.J. 4.

100. *Id.* at 18.

101. See text accompanying notes 48-49 *supra* (discussing Chapman Case). But see Smith Case (United States v. Mexico), [1929] Opinions 208, 210, 4 R. Int'l Arb. Awards 468, 470 (1929) (Nielsen, Comm'r, concurring):

Protection is a function of a State, and the discharge of that function should not be contingent on requests of the members of the community. On the other hand, in determining whether adequate protection has been afforded in a given case, evidence of a request for protection may be very pertinent in showing on the one hand

What then of the situation existing in a number of countries where terrorists repeatedly have murdered or kidnapped aliens for ransom? Sohn and Baxter in the commentary to article 13(1) of their draft convention¹⁰² note:

A State may also be put on notice of a special duty to protect an alien if there has been violence against him or against groups of aliens or against nationals of a particular State or against aliens in general in the recent past or if there have been threats of such violence and criminal conduct.¹⁰³

This view of notice is useful in the terrorism context. Where numerous terrorist incidents have occurred, such as kidnappings for ransom, and all or most of the targets have been nationals of one country, the failure of the state to take preventive measures when the foreseeability of further kidnappings was apparent would point to the imposition of state responsibility. The use of such "constructive" notice, however, does not of itself provide the answer.¹⁰⁴ Nevertheless, *Mead* indicates that it may be one of the elements to be considered in assessing the merits of a claim.¹⁰⁵ Responsibility in the main will turn on the factual question of "whether effective use was made of all available measures."¹⁰⁶

4. Summary and analysis

That a state has a general duty under international law to prevent whenever possible injuries to aliens caused by ordinary individuals is apparent. The present survey of arbitral decisions, state practice, and codification attempts solidly substantiates the point. Moreover, that duty extends to injuries caused by terrorists. Yet the duty is not absolute, for states are not held accountable for all injuries to all aliens

that there was a necessity for protection and on the other hand that warning of possible injury was given to the authorities.

102. See text accompanying notes 41-43 *supra*.

103. L. SOHN & R. BAXTER, CONVENTION, *supra* note 42, at 137. One of the views expressed by the United States during the preparation for the Hague Conference of 1930 was that "where the act of private persons complained of is only one in a series of similar acts, the repetition, as well as its open and notorious character, raises a presumption of knowledge on the part of authorities which may raise State responsibility." Letter from Secretary of State to the Preparatory Committee of the (Hague) Conference for the Codification of International Law (May 22, 1929), *citing* 3 Conference for the Codification of International Law, *Bases of Discussion* at 18 (Supp.), League of Nations publication V.10 (1929), *reprinted* in 5 G. HACKWORTH, *supra* note 30, at 655.

104. See generally Kutner, *supra* note 7, at 325.

105. See text accompanying notes 40-42 *supra*.

106. L. SOHN & R. BAXTER, CONVENTION, *supra* note 42, at 136-37. See Noyes Case (United States v. Panama), [1933] Opinions 190, 6 R. Int'l Arb. Awards 308 (1933).

inflicted by such individuals. What is required is that they exercise "due diligence" with regard to the prevention of these injuries. That means essentially that states are to take all reasonable measures under the circumstances to prevent terrorist acts.

"Due diligence," in turn, depends upon certain basic assumptions about the ability of the state to fulfill its duty. First, it assumes that the state has the means to provide protection. If the state lacks such means, or if the possibility of providing protection is very remote, then frequently no responsibility for the injury will be imposed.¹⁰⁷ For example, if the terrorist act takes place in an isolated part of a state, where the manpower and transportation necessary for protection are lacking, clearly the means to prevent injury are not available and, at a minimum, the state could plead the inability to prevent the act. On the other hand, if the act took place in an area where the local authorities could have or should have had "sufficient means" to prevent the injury, then one of the initial elements for the imposition of state responsibility would be met.

Second, "due diligence" assumes that the state had the opportunity to prevent the act but failed to do so. In the terrorism context, opportunity would be linked most often to the question of some sort of prior notice. Where states have been put on actual notice or "alerted in good time" of an imminent threat of terrorism, another element to establish liability under the principles of state responsibility would be present. Indeed, Sohn and Baxter have suggested that being put on constructive notice, as, for example, when a number of terrorist acts have occurred in the past in the same area, may be sufficient to satisfy the notice test.¹⁰⁸ Mead emphasized that a *prima facie* case for state responsibility exists where it has been established that such facts were known to the authorities and they did nothing or took inadequate action to prevent the injury.¹⁰⁹ Notice need not take the form of a special request for protection; it may be inferred from the level of lawlessness in the locality.

Having been put on notice, the final question becomes: what did the state do to avert the danger, or indeed could the danger have been averted? Here again the actions of the state are judged by their reasonableness under the circumstances. Where the state neglects or fails to take reasonable measures, responsibility will attach. In addition, where the state itself or its officials are involved in the promotion

107. See notes 39, 90-98 & accompanying text *supra*.

108. L. SOHN & R. BAXTER, CONVENTION, *supra* note 42, at 136-37.

109. See text accompanying notes 95-96 *supra*.

tion of terrorism, responsibility obviously runs directly to the state.

From what has been said, it is possible to put together a paradigm of a situation which would be the proper subject of a successful international claim for injuries resulting from terrorist acts, or at least one which would make the clearest case for finding state responsibility principles applicable to situations involving such acts. Mr. C is a diplomat representing state *B* in state *A*. He personally has received several threats over a period of weeks to the effect that he will be the object of a reprisal to be taken by a group of extremists in state *A* for what they have determined are the untoward policies of the government of state *B*. Mr. C has notified the local officials concerning the threats. In addition, the local authorities, through their own surveillance system, possess information which not only corroborates what Mr. C has told them, but also provides additional details, including the identities of the persons (already known to the police) who are either to kidnap or shoot Mr. C and the details of their plan of the attack. Mr. C increases his own protection from the embassy staff, but the local officials, although they have the means, fail to increase their surveillance, to inform Mr. C of the details of the plan, or to take other steps to prevent the attack. Events take place exactly as anticipated under the information that the police have received and Mr. C is killed. Under accepted principles of state responsibility, the government of state *A* would be held responsible for the injury since its officials failed, under the above facts, to take the necessary precautions to prevent the injury.

Altering the facts a little, assume the same basic situation with these variations: the victim is the general manager of a multinational corporation from state *B*; he is kidnapped for ransom; after the ransom is paid, he is executed. Under these circumstances, it would be difficult to avoid the conclusion that state *A* is again responsible. Questions will arise only as to the amount of the damages: would state *A* be liable both for the amount of the ransom paid and damages for the wrongful death? Arguably, it would.

These situations are perhaps the clearest examples that can be given of when state responsibility will attach with certainty. Other situations may be less clear. Assume the example of the corporate official again. The businessman this time is threatened by a person known to him, a threat he communicates to local officials. The local authorities take the man who threatened him into custody but subsequently release him for lack of evidence of his having committed any crime. Although they assign a policeman to shadow the businessman, he is shot anyway, and there is no proof of who the assailant was. The

*Sturtevant Case*¹¹⁰ suggests that, even when local authorities have failed to take precautionary measures, if no proof can be given as to the identity of the assailant state responsibility does not arise. The man who had threatened Sturtevant was arrested but freed upon payment of an insignificant fine. Two days thereafter, Sturtevant was found shot, apparently the victim of an ambush. In the absence of evidence showing that the maker of the threat was also the perpetrator of the criminal act, no responsibility arose.

What of the situation where it is general knowledge that terrorists have been active in kidnapping either alien corporate officials or persons with special international status? The local authorities can be assumed to have knowledge of the likelihood of it happening again, yet they may lack the means to provide protection for every foreigner. Thus the local authorities notify the aliens of the inability to afford them protection, and advise them to employ their own body guards. The local authorities concentrate their limited resources on prevention, but a major effort is directed to after-the-fact pursuit and prosecution. After the next kidnapping, will state responsibility arise? Since the local authorities were unable to prevent it—an assumption reasonable in these circumstances—liability probably will not be imposed. The most that can be said is that a *prima facie* case exists if it can be established either that the state itself was involved in the acts of terrorism, or that the state authorities, knowing of the danger and having the capacity to react to it, did nothing or took inadequate action to prevent the subsequent injury.

What of the actions of the authorities after a kidnapping when negotiations are being undertaken by the parties? What would be the significance of the fact that the authorities so bungled the situation as to cause the death of the hostage? A statement made by Huber in the *British Property in Spanish Morocco Case* suggests that there continued to be a duty: the authorities must take steps "as far as possible to avert the consequences of such acts."¹¹¹ The deaths of the Israeli Olympic athletes held hostage in Munich in 1972 arguably may be regarded as a breach of this duty. Liability certainly would exist in this case if the German authorities actually acted in the wholly reckless manner that has been suggested.¹¹²

110. *Sturtevant Case* (United States v. Mexico), [1930] Opinions 169, 4 R. Int'l Arb. Awards 665 (1930).

111. 2 R. Int'l Arb. Awards 615, 642 (1925) (authors' translation); see text accompanying notes 27-29 *supra*.

112. In the early morning hours of 5 September 1972, eight members of the Black September movement infiltrated the Israeli pavilion, assassinated two Israeli athletes

The most difficult aspect of applying traditional state responsibility norms to terrorist situations is that the latter rarely conform to the neat prior-notice pattern. Surprise attacks are endemic to terrorism; neither the authorities nor the victim know in advance what is to happen. How, then, can responsibility be assigned if there really is no opportunity to prevent the act other than comprehensive surveillance efforts? Huber, it will be recalled, held in the *Ziat, Ben Kiran Case*¹¹³ that the suddenness of the act vitiated responsibility based upon the duty to protect rationale.

It has been mentioned in passing that while a general duty of prevention exists states are not obliged to prevent every injury to every alien.¹¹⁴ There has been some speculation, however, about the possibility of imposing a rule of strict or even absolute liability on states in matters relating to terrorism.¹¹⁵ The cases involving injury to internationally protected persons come closest to supporting a strict liability rule.¹¹⁶ The *Chapman Case*, the *Janina* incident, and other precedents establish beyond doubt that persons with international status are owed a special duty of protection.¹¹⁷ The distinction between the

and took nine other ones hostage. In exchange for the hostages, the Arab terrorists demanded that Israel release 234 Arab prisoners. When the Israeli Government refused to cooperate, arrangements were made with the West German Government to have the terrorists and their hostages flown to Cairo, but at the airport police marksmen opened fire on the terrorists, in the process killing all nine Israeli hostages. The German authorities were able to arrest the three terrorists who survived the shooting.

Officials of other governments, journalists, and legal scholars have criticized the police action at the airport as a hasty and ill-conceived use of force. On 20 September 1972, the West German Government issued a "white paper" about the incident which took the position that all reasonable security measures had been taken by the Munich police. Although the Israelis had requested special protection and the police had received information regarding possible political incidents, they had received no specific threats against the Israeli athletes. Had such information been received, however, even massive security measures, given the terrorists' method of operation, would not necessarily have prevented the initial attack. West Germany advanced no explanation for the disastrous outcome of the police action at the airport. Arguably, state responsibility may arise for injuries resulting from such an action. Liability also might be based on the ground that the security measures were inadequate, especially in light of the fact that the victims of the incident had made special protection demands. Although the West German Government has not admitted responsibility on either ground, it has paid 3,200,000 Deutsche Mark to the families of the Israeli victims. Rousseau, *Chronique Des Faits Internationaux*, 77 R.G.D.I.P., *supra* note 31, at 1145-49 (1973).

113. *Ziat, Ben Kiran* Claim, 2 R. Int'l Arb. Awards 615, 729 (1925); see text accompanying notes 63-64 *supra*.

114. See text accompanying note 9 *supra*.

115. Strehel, *supra* note 7, at 208. See also Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189 (1965).

116. C. BAUMANN, *supra* note 7, at 134.

117. See notes 49-56 & accompanying text *supra*.

Chapman Case and the *Janina* incident lies in the fact that in *Chapman* the local authorities were put on prior notice that there was a likelihood of injury, while in *Janina* there was no such warning. In this respect, *Janina* more closely resembles the typical fact pattern of a terrorist strike. Moreover, in *Chapman* it was held that the local authorities had neglected their duty to provide protection; such was not the case in *Janina*, the Greek-Italian dispute over the assassination of General Tellini and his entourage. Although a settlement was reached in *Janina* in terms of damages, the incident cannot be used as authority to support a theory of responsibility, as Italy had urged, based solely on the fact that the incident took place within Greek territory. What had to be shown was some form of negligence on the part of Greek officials; that sort of evidence, however, never was advanced. Moreover, the response given by the special Commission of Jurists about the legal principles governing such occurrences, which Italy later accepted, clearly indicated the error of any theory of absolute, if not strict, liability.

In reading the cases relating to the injuries of internationally protected persons and property, care must be taken to find the real rationale for the granting of compensation. In many cases, the resolution of the controversy has turned not so much on the finding of liability under principles of international law, but more on political and humanitarian grounds. This method of resolving cases in itself suggests the feasibility of pressing claims based upon terrorists acts as a way of acquiring some measure of damages, even if on an *ex gratia* basis. At the same time, however, it also suggests that such efforts may contribute only marginally to the clarification of, or change in, the law relating to the duty of protection. Yet, if the objective is to encourage states to be more rigorous in their efforts to deter terrorist acts, presumably they will be so encouraged if they know that claims for damages may be forthcoming.

As the law now stands, except in the case of internationally protected persons where a stricter liability standard seems to prevail,¹¹⁸ the duty of prevention is a limited rather than an absolute or even strict one. Whether this duty has been breached is determined by reference to the means available to prevent the terrorist act and the measures being taken under the circumstances at the time it occurred. Given this state of the law, absent the existence of direct government involvement or of actions amounting to complicity, one would not expect to find a great many instances involving local ter-

118. *Id.*

rorism where a state could be held responsible. On the other hand, a detailed factual analysis of contemporary terrorism incidents surely would reveal a good many instances where a claim could be made with some degree of success based on the principles of state responsibility discussed above.

B. State Responsibility for Nonlocal Terrorism

One of the problems with contemporary terrorism is that it is not always neatly confined to the territorial limits of a single state. Terrorism respects neither persons nor boundaries. One of the more discernible characteristics of terrorist acts is that the planning of the act and the training and arming of those persons who are to carry it out may take place in one or more states, while the act itself may be perpetrated in yet another state. The ease of modern travel has made terrorist strikes possible in points far distant from the homelands of the terrorists or the locations of their training sites. The state in which the victims are found may be as much as half a world away.

This section focuses on the following setting. Groups of individuals in state A use its territory to prepare for acts of terrorism in state B.¹¹⁹ This scenario raises issues of state responsibility which, although related to those issues discussed in the above section on local terrorism, are made more complex by difficult questions of proof concerning the relationship between the state and the perpetrators of nonlocal terrorist acts and by interrelated issues such as the concern at the international level for the right of self-determination.

While many other examples could be cited, terrorist acts originating in Lebanon and taking place in Israel and elsewhere will serve as an illustrative point of departure since they starkly reveal the dimensions of the problem confronting the international community. According to a document prepared by the Israeli Government for presentation to the United Nations,¹²⁰ Egypt, Syria, Iraq, and Libya have acted as guarantors of the "Cairo Agreement" of 1969, which reportedly allows Arab paramilitary organizations to conduct operations from Lebanese territory.¹²¹ The implications of that agreement

119. While other hypothetical situations are imaginable, the following spring to mind and are suggestive of the types of problems which arise in this context: foreigners use state A as a base for terrorism in state B; foreigners land in state A, from which terrorist strikes are committed in state B against state C; nationals of state A use their state as a base for terrorism in state B; and nationals of state A train there for terrorism in state B against state C.

120. *Accessories to Terror: The Responsibility of Arab Governments for Organization of Terrorist Activities*, U.N. Doc. A/C.6/L.872 (1972).

121. *Id.* at 24.

have been far-reaching. For instance, Kozo Okamoto, supposedly a member of the Japanese "Red Army" and one of the participants in the Lod Airport attack on 30 May 1972, is reported to have testified:

In September, I received a letter inviting me to come to Beirut, if I wanted . . . to receive military training. [After arriving] an Arab came, called Abu Aija. We did gymnastics to get fit, and afterwards we trained in Port Saida, in explosives, shooting with pistols and Kalatchnikoffs, and hand grenades . . . On 22 May we left Beirut for Paris and on 30 May we left for Tel Aviv airport. We carried out the military operation according to our Baalbeck plan and we added the attack on the plane.¹²²

During a press conference on 2 June 1970, President Franjiah of Lebanon, with an air of apparent disbelief, asked: "How can Lebanon be held responsible for an action carried out by foreigners . . . ?"¹²³ Actually, the real question is under what circumstances can a state incur responsibility for acts of terrorism perpetrated abroad by individuals who trained and prepared for their acts within its borders?¹²⁴

1. Some preliminary observations

Over the years, numerous writers have suggested at least a partial answer to the question of state responsibility for nonlocal terrorist acts. For example, Grotius, in quoting Agathias, observed that "[t]hey who invade the territories of others and harm those who have done no wrong, are both lawless and wicked."¹²⁵ Grotius developed two related theories upon which state responsibility could be based, *patientia* and *receptus*. As Garcia-Amador has explained, the first term "denotes the situation in which the State is aware of an individual's intention to perpetrate a wrongful act against a foreign

122. *Id.* at 27-28. Okamoto also is reported to have testified that both Muhammed Abut Al Hija and Yusuf Ibrahim Taufiq, the two terrorists convicted by a Swiss court for the attack on an El Al plane in Zurich in 1969 but later released in exchange for hostages of another hijacking, trained foreigners in terrorist tactics on Lebanese soil. *Id.* at 29.

123. *Id.* at 27.

124. That the question is of continuing interest is shown by the events surrounding the June 1976 hijacking of an Air France jet to Entebbe, Uganda, and the October 1976 bomb explosion aboard a Cuban airliner off Barbados. According to published accounts, Uganda for some time has been a training site for the Popular Front for the Liberation of Palestine. W. STEVENSON, *supra* note 2, at 67-72. In the Western Hemisphere, allegations have been made that the United States, Venezuela, and several other Latin American countries have tolerated, if not actually encouraged, the terrorist activities of anti-Castro Cuban exiles. N.Y. Times, Nov. 15, 1976, at 10, col. 1.

125. 2 H. GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES, ch. 12, § 3(2) (F. Kelsey trans. 1925).

State or sovereign, but fails to take the proper steps to thwart his designs."¹²⁶ The second term "denotes the situation in which the State receives an offender and, by refusing either to extradite or to punish him, assumes complicity in the offense."¹²⁷ Later, Vattel argued that a state would become responsible for the crimes committed by its nationals "when by its practices and principles of its government it accustoms and permits its citizens to rob and ill treat foreigners at will, *to make inroads into neighboring territory . . .*"¹²⁸ Contemporary writers have advanced similar views. Regarding terrorist-related acts, Professor Starke speaks positively of the "duty of a State to prevent within its borders terrorist activities directed against foreign States."¹²⁹

There is to be sure an answer to President Franjiah's question as to how Lebanon could be held responsible for the acts of foreigners. At the outset, it seems an unlikely *a priori* assumption that a state *never* could be held responsible for a terrorist strike which originated from within its territory. In order to give a more accurate answer, however, it is first necessary to have some idea about the factual setting out of which the terrorist act grew. The analysis also must take into account the conditions which determine whether or not a state must assume responsibility for the acts of ordinary individuals. A variety of hypothetical situations are possible in this context: an organization of terrorist groups on national territory, supported by the government, for incursion into the territory of another state or states; an organization of terrorist groups supported by the government on nonnational territory for terrorist activities in third states; support for terrorists already operating on the territory of other states; full knowledge and toleration of the organization of terrorists on national territory; negligence in the control of terrorist groups operating from national territory; inability to control the activities of such groups on national territory; and the lack of knowledge on the part of the government that national territory is being used as a base for the activities of terrorist groups.¹³⁰ As Professor Brownlie has noted in the context of a discussion of armed bands, "there is a qualitative difference be-

126. [1957] 2 Y.B. INT'L L. COMM'N 123, U.N. Doc. A/CN.4/106, reprinted in CODIFICATION, *supra* note 40, at 28.

127. *Id.*

128. 2 E. DE VATTEL, *supra* note 31, at § 78 (emphasis added).

129. J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 96 (6th ed. 1967). See also H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 205-06 (2d rev. R. Tucker ed. 1966).

130. This breakdown is an adaptation of a synthesis developed in Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 712 (1958).

tween these situations resulting in completely distinct questions of responsibility.”¹³¹

The first task, then, is to survey the decisions of international arbitral tribunals, the experience developed by state practice, and the efforts to codify international law with a view to finding support for these preliminary observations concerning the duty of a state to prevent within its borders wrongful acts directed against other states. The second task is to relate that body of international precedent to the possibility of one state bringing a claim against another state for the latter’s failure to prevent the use of its territory as a base for terrorist strikes.

2. *The duty to prevent the use of territory for the preparation of acts of nonlocal terrorism*

In the past hundred years, surprisingly few claims have arisen involving a state’s failure to prevent the use of its territory as a base for nonlocal activities which can be analogized to acts of terrorism. Of the few cases, three are useful, at least initially, for establishing a state’s duty to prevent the use of its territory for the preparation of acts of nonlocal terrorism: the *Alabama Claims* arbitration, the *Texas Cattle Claims*, and the treatment by the League of Nations of the incident involving the assassination of King Alexander of Yugoslavia and the French Minister of Foreign Affairs. The preliminary analysis will consider the factual setting of these cases and the type of duty they establish.

a. *The Alabama Claims arbitration*

The *Alabama Claims* arbitration in 1871 is the first and possibly the most significant treatment of the duty to prevent the use of national territory as a base for activities directed against a foreign state.¹³² The claims, brought by the United States against Great Britain, rested essentially on a theory of breach of neutrality. Although they involved the alleged violation of neutrality principles by Great Britain for aiding Confederate ships during the Civil War, the claims concerning the *Alabama* and the *Florida* (*née Oretto*) are a useful source of law for purposes of determining the responsibility of a state to prevent the use of its territory as a base for nonlocal terrorist activities.

The *Alabama* claim was based upon two sets of facts: first, the con-

131. *Id.* at 713.

132. For the principal documents produced by the arbitration, see 7 J.B. MOORE, DIGEST OF INTERNATIONAL LAW 1059-67 (1906).

struction and escape from a British port of a ship later to be known as the *Alabama*; and, second, its subsequent outfitting and arming with the assistance of ships sent from Great Britain. The *Alabama*, designated as number 290, was built in the port of Liverpool. During the ship's construction, United States officials learned that it was destined to become part of the Confederate war effort. They repeatedly protested at official levels and demanded that Great Britain take the necessary measures to prevent the ship's departure from port upon its completion. The United States based its protests on a theory of neutrality which drew its strength from a proclamation of neutrality relating to the Civil War issued by Her Majesty on 13 May 1861. Yet orders to detain the ship were issued so late that the *Alabama* managed to "escape" the British authorities. Rather perfunctory and inevitably unsuccessful attempts were made to pursue and arrest her. The *Alabama* successfully made her way to the vicinity of Terceira, where she was equipped and armed for participation in the Civil War by two vessels, the *Agrippina* and the *Bahama*, specifically sent from Great Britain for that purpose.

The history of the *Florida* is similar to that of the *Alabama*. United States officials knew of her construction, repeatedly protested it, and called for the ship's detention in British waters. The British Government, however, failed to take any action which could be considered as a sign of willingness to fulfill its obligations under the proclamation of neutrality. Once the *Florida* had crossed the Atlantic, it was permitted to use ports in the British colonies, first at Nassau, where it was the subject of some sort of judicial inquiry but eventually released, and later at Green Cay, where it enlisted men and took on supplies and armaments with the assistance of another British vessel, the *Prince Alfred*. Thereafter, the record indicates that some half-hearted attempts were made to stop the vessel, but it made its way safely to the port of Mobile.

The three basic rules under which the claims were adjudicated are an important feature of the arbitration. These rules, known as the "Three Rules of Washington," set forth standards for gauging the lawfulness of the behavior of states under the circumstances cited above. Under these rules, a neutral government is bound:

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended . . . to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of . . . [such a ship].

Secondly. Not to permit . . . either belligerent to make use of its

ports or waters as the base of naval operations . . . or for the purpose of the renewal . . . of . . . supplies . . . or the recruitment of men.

Thirdly. To exercise due diligence . . . [to prevent the use of its] ports and waters [by] . . . all persons [for the commission of any of the violations described above].¹³³

At the time of the signing of the arbitration treaty, Great Britain was at pains to point out that, when the claims actually arose, the precepts established in the "Rules" were not, in its view, a "statement of principles of international law . . ."¹³⁴ On the other hand, the United States argued that even before the treaty the substance of the "Rules" reflected principles of international law. There was, however, agreement between both contracting parties that they would abide by those principles in the future and attempt to get other nations to accede to them.¹³⁵

After considering the claim, the arbitration tribunal held that the British Government had "failed to use due diligence in the performance of its neutral obligations" as required by treaty and international law.¹³⁶ One of the more important contributions to the for-

133. *Id.* at 1059.

134. *Id.* at 1067.

135. *Id.* at 1074.

136. *Id.* at 1061. Because the award in the case turned upon the scope and meaning of the "due diligence" standard, it is worth examining the arguments advanced by the parties before the arbitration tribunal and the tribunal's response thereto. The United States asserted:

"[T]he diligence of the neutral should 'be proportioned to the magnitude of the subject, and to the dignity and strength of the power which is to exercise it' . . . , and that it should be 'gauged by the character and magnitude of the matter which it may affect, by the relative condition of the parties, by the ability of the party incurring the liability to exercise the diligence required by the exigencies of the case, and by the extent of the injury which may follow negligence'"

Id. at 1066.

The position taken by Great Britain was that:

"Due diligence on the part of a sovereign government signifies that measure of care which the government is under an international obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, is to be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded. The measure of care which a government is bound to use in order to prevent within its jurisdiction certain classes of acts, from which harm might accrue to foreign states or their citizens, must always (unless specifically determined by usage or agreement) be dependent, more or less, on the surrounding circumstances, and can not be defined with precision in the form of a general rule."

Id. at 1066-67.

When it applied the "due diligence" test the arbitral tribunal observed that in this specific case:

"The due diligence referred to in the first and third of the said rules ought to be

mulation of international law on this subject was the holding of the tribunal that "the government of Her Britannic Majesty can not justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed . . ."¹³⁷ In short, what the British Government was arguing was that under its laws it was incapable of dealing with the situation.¹³⁸ While this holding pertained specifically to the claims relating to the *Alabama*, all the members of the arbitration tribunal found that Great Britain had failed by "omission" to fulfill its duties under rules one and three set out above. It was not so much that preventive measures were not employed, but that the ones taken were inadequate to satisfy the obligations under the duty. According to the documentary evidence, the attempt by British authorities to stop the ship's departure from port was a case of "too little and too late." Orders issued to detain the vessel were dispatched at such a late date as to make their enforcement impossible. The tribunal concluded that the British efforts were "so imperfect as to lead to no result."¹³⁹ Moreover, when the *Alabama* later was admitted to several ports in British colonies, "instead of being proceeded against as it ought to have been in any and every port within British jurisdiction,"¹⁴⁰ no action was taken. These dalliances and omissions, coupled with the full knowledge of British authorities, were sufficient evidence to support a finding that Great Britain had violated the rules governing the arbitration.

The *Alabama Claims* arbitration strongly suggests that once a government has notice, either from its own observations or from the complaints it receives from other states, that its territory is being used for the preparation of hostile acts, perfunctory efforts to stop these activities will not be sufficient to meet its duty under international law.

It should be noted that, *stricto sensu*, the holding in the *Alabama Claims* arbitration is of limited application. The claims involved the

exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfill the obligations of neutrality on their part; and the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's Government of all possible solicitude for the observance of the rights and duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861.'"

Id. at 1067.

137. *Id.* at 1061.

138. Cf. text accompanying notes 79-106 *supra* (discussing negligence in failing to prevent local terrorism).

139. 7 J.B. MOORE, *supra* note 132, at 1061.

140. *Id.*

liability of a government for its acts as they affected one of two contending parties within another state, both parties having assumed the status of belligerents at the time. The claims advanced in the arbitration, then, differ factually from claims which normally would arise in the context of terrorism. The *Alabama Claims* decision was based essentially on a narrowly defined theory of neutrality, rather than a general duty to abstain from activities which potentially might affect all states. Moreover, the "Rules" governing the claims were carefully drawn to cover only those instances in which neutral territory was being used for the construction, outfitting, arming, and giving of assistance to vessels of belligerents. Nevertheless, the *Alabama Claims* do serve as a starting point from which one can elaborate a theory of state responsibility governing matters of terrorism. As shall be seen below,¹⁴¹ the duties there established served as a building block for the declaration of the League of Nations regarding terrorism after the assassination of King Alexander of Yugoslavia in 1934.

b. *The Texas Cattle Claims*

The *Texas Cattle Claims*,¹⁴² decided by the American-Mexican Claims Commission established by Congress in 1942,¹⁴³ are perhaps the richest source of jurisprudence on the duty of a state to deny the use of its territory to private individuals as a seat for activities similar to terrorism. The claims involved essentially two types of activities which recurred between 1860-1875, both of which are of interest to the present inquiry. The first activity involved cross-border raids from Mexican territory by outlaws and military personnel made with the blessing of General Cortina, then the highest ranking official of the Mexican Government in the region. The second activity concerned raids in which the Kickapoos and other Indian tribes took part. The facts fit perfectly into the effort to ascertain the basis upon which state responsibility may be imposed for failure to prevent the use of national territory as a base for nonlocal terrorist activities. On

141. See text accompanying note 152 *infra*.

142. AMERICAN-MEXICAN CLAIMS COMMISSION, REPORT TO THE SECRETARY OF STATE 51 (1948); 8 WHITEMAN, DIGEST, *supra* note 88, at 749. As part of the Texas Cattle Claims, the American-Mexican Claims Commission also was called upon to evaluate a number of claims relating to injury and damage caused by the Mexican Army on United States territory as a result of the exercise of the right of self-defense. The Commission took the view that where injuries were "incidental" to the exercise of that right, "prompt atonement" was to be made in the form of compensation. AMERICAN-MEXICAN CLAIMS COMMISSION, *supra* at 68; 8 WHITEMAN, DIGEST, *supra* note 88, at 754.

143. Settlement of Mexican Claims Act of 1942, ch. 766, § 2528, 56 Stat. 1058.

the one hand, the *Texas Cattle Claims* presented cases in which the government or its officials were more or less actively involved in the whole affair. On the other hand, there were cases in which no active involvement was found, but the state nevertheless neglected to stop ordinary individuals from committing the injurious act.

In regard to the former, the American-Mexican Claims Commission ended its fact-finding with these conclusions: first, General Cortina was the leader of the "illegal enterprise"; second, the raids were not of a "sporadic nature," but rather bore all the signs of a general "condition of outlawry" which had lasted some fifteen years; and third, the Mexican Government had admitted that the principal cause of the raids into the United States was Cortina's presence near the border. Yet "[n]otwithstanding such knowledge the Mexican Government delayed for nearly seven years the taking of action necessary to terminate international wrongs."¹⁴⁴ With respect to the activities of the Kickapoos, the Commission found that "the Mexican Government not only failed to take reasonable measures to put an end to the crimes against a friendly neighboring state but placed every obstacle in the attempt by the United States authorities to terminate the difficulty. . . ."¹⁴⁵

These conclusions shed considerable light upon the extent of state responsibility for terrorist activities which originate in the territory of one state and are perpetrated in the territory of another state. The factual elements of state responsibility in the *Texas Cattle Claims* were numerous: the raids were "systematic and continuous"; they were "openly and notoriously organized" in Mexico; government officials actually were "implicated" in them; although aware of the situation over a long period of time, the Mexican Government neglected to take "the necessary action" to stop the raids and thus facilitated them; and Mexican officials failed to take "steps to prevent" the raids. A more detailed enumeration of the elements of a violation of international law in this area would be hard to find. From these conclusions of fact, state responsibility rested on four legal grounds:

- (1) active participation of Mexican officials in the depredations; (2) permitting the use of Mexican territory as a base for wrongful operations against the United States and the citizens thereof, thus encouraging the wrongful acts; (3) negligence, over a long period of years, to prosecute or otherwise to discourage or prevent the raids; and, (4) failure to coop-

144. AMERICAN-MEXICAN CLAIMS COMMISSION, *supra* note 142, at 62; 8 WHITEMAN, DIGEST, *supra* note 88, at 751.

145. AMERICAN-MEXICAN CLAIMS COMMISSION, *supra* note 142, at 66; 8 WHITEMAN, DIGEST, *supra* note 88, at 752.

erate with the Government of the United States in the matter of terminating the condition in question.¹⁴⁶

One possible interpretation of these legal grounds would require that they all be present in order to engage a state's responsibility. While having all the grounds present obviously would strengthen a claim, the presence of any one of them should be adequate to substantiate a violation of international law. These elements do illustrate, however, the various levels of state involvement in nonlocal activities. Where state officials actively participate in nonlocal terrorist activities, responsibility runs directly to the state. The state also will be held responsible where it permits or acquiesces in the use of its territory as a base for terrorist operations. Such toleration would be evidenced, for example, by a government's statements or actions indicating that there will be no interference with terrorist planning and training within its territory. Where there is neither active participation nor passive acquiescence, however, the test is one of negligence: did the state neglect its duty to prevent its territory from being used for the organization or commission of internationally wrongful acts by failing to take measures to bring an end to the activities?

c. *The League of Nations treatment of the assassination of King Alexander*

The assassination of King Alexander of Yugoslavia and the French Minister of Foreign Affairs in Marseilles on 9 October 1934, and the ensuing Yugoslav allegation that Hungary was responsible, are significant events insofar as state responsibility for acts of terrorism is concerned.¹⁴⁷ These events touched off some of the most intensive international efforts to define and codify the duty of a state to suppress terrorism, especially with regard to the use of its territory as a springboard for terrorist acts in another state. The specificity of the statements made about the above events is particularly helpful. While previous attempts to establish the norms of state responsibility had treated the duty of prevention only generally, in the above debate the norms were given more specific consideration in the terrorism context. This debate, the pronouncements of the League of Nations, and the latter's subsequent formulation of the Convention for the

146. AMERICAN-MEXICAN CLAIMS COMMISSION, *supra* note 142, at 67; 8 WHITEMAN, DIGEST, *supra* note 88, at 753.

147. For a brief note on the claims arising from the assassination, see Kuhn, *The Complaint of Yugoslavia Against Hungary with Reference to the Assassination of King Alexander*, 29 AM. J. INT'L L. 87 (1935).

Prevention and Punishment of Terrorism¹⁴⁸ contributed substantially to defining a state's duty to suppress terrorism.

When presented with the question of whether states were under a duty to suppress activities which threatened the political or social order of another state, the Council of the League of Nations had little trouble answering in the affirmative. An unanimously adopted resolution made clear that "it is the duty of every State *neither to encourage nor tolerate* on its territory any terrorist activity with a political purpose . . ."¹⁴⁹ Moreover, "every State must *do all in its power* to prevent and repress acts of this nature and must for this purpose lend its assistance to Governments which request it . . ."¹⁵⁰ As to the involvement of the Hungarian Government in the assassinations, the resolution suggested that Hungary might "have incurred, at any rate through negligence, certain responsibilities relative to the acts connected with the preparation of the . . . crime."¹⁵¹

The statements by the League of Nations are comparable to the rulings in the *Alabama Claims* arbitration. In essence the League of Nations took the norms derived from that arbitration and applied them to the suppression of acts of terrorism, casting aside whatever restrictive features the neutrality doctrine imposed on the earlier precedent.¹⁵² Two concepts, then, were given shape by the League. First, states have an obligation under international law to prevent activities within their borders which lead to terrorist acts in other states. Second, states which tolerate such activities are liable for them under state responsibility principles. For the first time, moreover, these concepts were applied to a situation in which terrorists made preparations in one state and carried out their plan in another state.

One by-product of the troublesome Yugoslav-Hungarian dispute was the establishment of a special committee of experts to draft an

148. 1 LEAGUE OF NATIONS O.J. 23 (1938).

149. 12 LEAGUE OF NATIONS O.J. 1759 (1934) (emphasis added).

150. *Id.* (emphasis added).

151. *Id.* at 1760.

Regarding the involvement of Hungary in the assassination of King Alexander and the French Foreign Minister, see F. GROSS, VIOLENCE IN POLITICS: TERROR AND POLITICAL ASSASSINATION IN EASTERN EUROPE AND RUSSIA (1972). Gross explains:

After the coup d'état of King Alexander of Yugoslavia, Ante Pavelich founded a fascist and terrorist Croat organization Hrvatski Ustasha (Croat Upriser). The party was organized along totalitarian lines. Their goal was the creation of a separate Croat state, carved out of Yugoslavia, to be sure a totalitarian Croatia. The Ustashis were supported by the Italian and Hungarian governments and had camps in both Hungary and Italy. From there they tried to organize raids into Yugoslavia.

Id. at 65.

152. See text accompanying notes 133 & 141 *supra*.

international agreement on the suppression of terrorism. This document, which became known as the Convention for the Prevention and Punishment of Terrorism (Convention on Terrorism), was adopted on 16 November 1937.¹⁵³ According to article 1(1), the Convention on Terrorism "reaffirmed" the precept of international law which makes it "the duty of every State to refrain from any act *designed to encourage terrorist activities directed against another State* and to prevent the acts in which such activities take shape."¹⁵⁴ These norms, however, failed to gain a place as rules of conventional international law since only one state, India, ratified the Convention on Terrorism.¹⁵⁵

3. *Degree of state involvement in nonlocal terrorism*

a. *Encouraging, tolerating, or acquiescing in the use of territory as a base for nonlocal terrorism*

Most incidents of transnational terrorism have involved the question of state responsibility for the acts of armed bands.¹⁵⁶ States constantly have been called upon to deal with complications which arise in such situations. The disputes have tended to focus on the degree of actual state involvement in the activities of groups of individuals. The experience in the mid-19th and early 20th centuries along the United States-Mexican border already has been discussed.¹⁵⁷ The *Caroline Case*¹⁵⁸ involved a similar dispute. In that incident, a band of men apparently acting under the aegis of British authority crossed into United States territory to destroy a vessel which had been used to supply and arm a group of men who had taken possession of a

153. 1 LEAGUE OF NATIONS O.J. 23 (1938).

154. L.N. Doc. C/94/M/47 Annex 4, at 196-97 (V. 1938) (emphasis added).

155. Nonetheless, 24 states signed the convention. See Franck & Lockwood, *supra* note 14, at 70. Some semblance of the language of the 1937 Convention on Terrorism found its way into the recently formulated United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, G.A. Res. 3166, 28 U.N. GAOR, Supp. (No. 30) 146, U.N. Doc. A/9030 (1973).

156. "Armed bands" has been defined as a "term designating an irresponsible group of individuals who invade foreign territory and commit hostile acts upon persons and property by methods or in circumstances different from those of normal warfare." M. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES 109 (1962).

157. See text accompanying notes 67-69, 74-76, 92-98 *supra*.

158. 2 J.B. MOORE, *supra* note 132, at 412.

For a thorough discussion of the case, see Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82 (1938).

British island near Buffalo during the Canadian rebellion of 1837. The justification for the raid was one of self-defense, since United States territory was being used to furnish logistical support for the activities of rebels in Canada.

At a later date, individuals who took part in the raid were apprehended in New York and threatened with prosecution. At that point Great Britain and the United States became enmeshed in lengthy discussions concerning the culpability of the individuals who participated in the raid under the criminal law of New York. Among the correspondence concerning one McLeod is found the following statement by Great Britain:

The principle of International Law that an individual doing an hostile act authorized or ratified by the Government of which he is a Member [scilicet, a subject] cannot be held individually answerable as a private . . . malefactor, but that the Act becomes one for which the State to which he belongs is in such case alone responsible, is a principle too well established to be now controverted.¹⁵⁹

While relying upon the concept of self-defense to justify the hostile act in question, the principle maintained by the British Government is broad enough to render a state liable under international law should the acts it sponsors or condones be of a terrorist nature.

Since World War II, there have been numerous prominent incidents involving alleged government connivance in the activities of "armed bands." One of the more illustrative is the Greek complaint before the First Committee of the General Assembly of the United Nations, during its Second to Fifth Sessions, about attempts made from outside Greece to undermine its political independence. Greece alleged that some of her northern neighbors had given aid to guerrillas who were seeking to overthrow the Greek Government. None of the representatives challenged the underlying proposition that the giving of such assistance, if proven, would be a violation of international law and a breach of the United Nations Charter. Nevertheless, those governments accused, Albania and Bulgaria, asserted that they had complied with their international duty by disarming and imprisoning individuals found within their territories who were attempting to subvert the government of Greece.¹⁶⁰ In the end, the allegation could not be established.

Recent British practice provides other examples which by and large

159. Letter of Nov. 20, 1854, reprinted in 2 A. MCNAIR, INTERNATIONAL LAW OPINIONS 230 (1956).

160. 3 U.N. GAOR 294 (1948) (Bulgaria); *id.* at 332 (Albania).

offer more insights into the factual problems involved than into the relevant legal norms governing state responsibility for nonlocal terrorism. In late January 1962, for instance, an armed group of thirty Guatemalan civilians crossed the border into British Honduras and hoisted their flag. British troops were sent to drive them out and successfully accomplished this mission, in the process capturing several Guatemalans who subsequently were prosecuted by the British authorities. The British Government, while protesting the incursion, made no formal claim, and the Guatemalan Government gave the assurance that it would "take all possible steps to prevent a repetition" of the event.¹⁶¹ An implicit understanding seems to have existed between the two governments that state responsibility would not arise simply because the individuals came from Guatemala.

A different factual problem is demonstrated by Great Britain's protest during 1964 against Egypt's involvement in bombings in Aden. The British argued that the wide circulation given by the Cairo press and radio to the Liberation Front's activities and its appeals to open violence established government complicity.¹⁶² Egypt not unexpectedly denied any formal connection with the Liberation Front in Aden and disclaimed any responsibility for the bombings.¹⁶³

In the early 1950s, the United Nations General Assembly asked the International Law Commission to prepare a text of offenses which would bring about liability on the part of states, a request which produced the Draft Code of Offences Against the Peace and Security of Mankind.¹⁶⁴ Article 2(4) of the draft code made it an offense for a state to encourage "armed bands" to make "incursions into the territory of another State," or even to tolerate the use of its territory "as a base of operations or as a point of departure for incursions."¹⁶⁵ Article 2(5) prohibited "activities calculated to foment civil strife."¹⁶⁶ Article 2(6) contained the most specific reference to terrorism. It proscribed: "The undertaking or encouragement by the authorities of a State of

161. [1962-I] THE CONTEMPORARY PRACTICE OF THE UNITED KINGDOM IN THE FIELD OF INTERNATIONAL LAW 54 (E. Lauterpacht ed. 1962).

162. Oppenheim takes the view that states have no duty to suppress propaganda generated by private persons directed at foreign governments. 1 L. OPPENHEIM, *supra* note 8, at 260. Other authorities take a wider view of the duty to restrain propaganda. See D. BOWETT, SELF-DEFENCE IN INTERNATIONAL LAW 49-50 (1958). See generally B. MURTY, PROPAGANDA AND WORLD PUBLIC ORDER: THE LEGAL REGULATION OF THE IDEOLOGICAL INSTRUMENT OF COERCION (1968).

163. [1964-II] BRITISH PRACTICE IN INTERNATIONAL LAW 185 (E. Lauterpacht ed. 1966).

164. [1950] 2 Y.B. INT'L L. COMM'N 249, U.N. Doc. A/CN.4/19 + Add. 1 & 2.

165. [1954] 2 Y.B. INT'L L. COMM'N 150, U.N. Doc. A/2693.

166. *Id.*

terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State."¹⁶⁷ It should be kept in mind, of course, that the draft code generally was regarded as a statement *de lege ferenda*. Nevertheless, the language of article 2(6) would appear to reflect customary international law. After surveying various forms of post-World War II state practice, Professor Brownlie concludes that, although state practice is "not very coherent in its legal context," it demonstrates at a minimum "that State complicity in incursions by armed bands or toleration of activities of such bands operating from national territory is 'unlawful'"¹⁶⁸ His observation is a sound one and should be expanded to cover acts of terrorism as well.

Given the existence of state responsibility norms on which a claim can be based for failure to prevent the use of territory for terrorist activities, the difficulties inherent in producing sufficient factual data to support such a claim next must be faced. Perhaps an example would best illustrate the political and factual realities of attempts to establish state responsibility. Israel's justification of the Beirut raid in 1968 before the United Nations Security Council, although specifically grounded on the law of reprisal, is a good example.¹⁶⁹ Israel failed in its bid to demonstrate any linkage between Lebanon and the two Arab members of the Popular Front for the Liberation of Palestine (PFLP) who allegedly had flown from Beirut to Athens to attack an El Al airliner there. One of Israel's arguments to justify the Beirut reprisal was that Lebanon was "assisting and abetting acts of warfare, violence, and terror by irregular forces and organizations."¹⁷⁰ The Security Council failed to reach that conclusion because the allegations were too general and basically unsubstantiated.¹⁷¹ Had Israel produced sufficient specific proof of the link between the activities of the PFLP and Lebanon, either in the way of complicity or negligence, it would have augured well for its claim. Israel was unable to do so, however, and the fact that the attack was carried out by indi-

167. *Id.* at 151.

168. Brownlie, *supra* note 130, at 729.

169. Compare Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969), with Blum, *The Beirut Raid and the International Double Standard: A Reply to Professor Richard A. Falk*, 64 AM. J. INT'L L. 73 (1970).

170. Letter from the representative of Israel to the President of the United Nations Security Council (Dec. 29, 1968), reprinted in 23 U.N. SCOR, Supp. (Oct.-Dec. 1968) 180, U.N. Doc. S/8946 (1968).

171. The United States delegate is reported to have said: "Nothing that we have heard has convinced us that the Government of Lebanon is responsible for the occurrence in Athens." 23 U.N. SCOR (1460th mtg.) 6, U.N. Doc. S/p.v. 1460 (1968).

viduals coming from Lebanon was not enough in itself to render Lebanon responsible and hence justify Israel's action.

*b. Negligence in the prevention of use of territory
as a base for nonlocal terrorism*

The duty discussed in this subsection relates not to refraining from encouraging the use of territory for terrorist operations, but to taking active steps to ensure that individuals who are engaged in such activities are prevented from doing so.

During the early part of World War I, the British Government protested to the United States that its territories were being used for the conjuring up of "intrigues" against British possessions in China. Great Britain stated that it could not regard the "negligence of the United States as being compatible with the duties of a neutral power."¹⁷² After receiving the complaint, the United States investigated the allegations and found that although the individuals involved in the intrigues had sailed from United States ports there was no evidence that they had formed, in violation of United States law, military expeditions from those ports, nor had they been supplied with arms and ammunition in the United States.¹⁷³ The incident contained obvious echoes of the duties subscribed to by the two countries as a result of the *Alabama Claims* arbitration.¹⁷⁴

This incident raises the question of what steps a state must take to fulfill its duty to prevent nonlocal terrorism. A fairly significant number of states have neutrality laws in force which not only assist them in complying with the duty to prevent the use of their territory for terrorist operations, but also afford them a ready means of demonstrating vigilance in attempting to meet that duty.¹⁷⁵ The relevant Venezuelan law, codified in article 154 of the Penal Code of 1926, while more broadly drawn than its counterpart in the United States,¹⁷⁶ is illustrative of such laws. It provides, *inter alia*:

172. 7 G. HACKWORTH, *supra* note 30, at 401.

173. *Id.* Before reviewing the material discussed in the text, Hackworth asserted: "Neutral territory must not be used as a base from which military expeditions set forth or military enterprises are carried on against another state." *Id.* at 396-97.

174. See text accompanying notes 132-41 *supra*.

175. See generally COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES (F. Deak & P. Jessup eds. 1939) [hereinafter cited as COLLECTION OF NEUTRALITY LAWS].

176. 18 U.S.C. § 960 (1970). The statute reads in part:

Whoever, within the United States, knowingly begins or sets on foot or provides or prepares a means for or furnishes the money for, or takes part in, any military or naval expedition or enterprise to be carried on from thence against the territory or

Venezuelan nationals and aliens who recruit troops or accumulate arms, or form revolutionary councils (*juntas*) or prepare expeditions in Venezuela or who leave the territory of the Republic with manifest hostility for the purpose of attacking or invading the territory of a friendly or neutral nation shall be punished¹⁷⁷

Not infrequently, laws setting out the obligations of a state relating to neutrality and the preparation of military enterprises state that their violation is "contrary to the laws of nations."¹⁷⁸ In Brownlie's words, the substance of such laws may be "viewed as a legal duty [under international law] as well as a matter of avoiding complications in relations with other States."¹⁷⁹

Incidents during the Mexican revolution relating to the use of United States territory are illustrative of how states have interpreted their duty to prevent such activities. For the United States, the issue of whether to attempt to stop Mexican revolutionaries from drifting back and forth across the border turned not only on whether the United States was under a duty to do so at international law, but also on the interpretation of the neutrality statute in force at the time. That law made it a federal crime to "set on foot" military expeditions within the United States designed to create rebellions elsewhere.¹⁸⁰ The Department of State reasoned that the sale of arms to Mexican rebels, when not related to the actual outfitting of a military expedition, was not a criminal offense.¹⁸¹ Moreover, with regard to the passage of men from United States territory into Mexico, the Department of State contended that "there is no rule of international law requiring, and no local Federal statute that would permit Federal Officials of this Government to prevent the passage into foreign territory of unarmed and unorganized men either singly or in groups."¹⁸²

dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace [commits a felony].

177. COLLECTION OF NEUTRALITY LAWS, *supra* note 175, at 1289. The Venezuelan law takes on new life in light of the October 1976 bombing of a Cuban airliner off Barbados. See note 124 *supra*.

178. COLLECTION OF NEUTRALITY LAWS, *supra* note 175, at 1173 (Proclamation of March 24, 1794, No. 4, 11 Stat. 753). Issued by George Washington, this neutrality proclamation admonished citizens in Kentucky to avoid unlawful enlistments for the purpose of invading nations at peace with the United States.

179. Brownlie, *supra* note 130, at 724.

180. Act of March 4, 1909, ch. 321, § 13, 35 Stat. 1090 (1909) (current version at 18 U.S.C. § 960 (1970)). See note 176 *supra*.

181. 2 G. HACKWORTH, *supra* note 30, at 334-35, 337-38.

182. Letter from Secretary of State Knox to Ambassador de Zamacona (June 7, 1917), reprinted in 2 G. HACKWORTH, *supra* note 30, at 34.

Despite the position taken by the Department of State, the United States did attempt to prosecute under its neutrality statutes such violations as it thought came within the definition of the law. *Gandara v. United States*¹⁸³ contains some insights into the approach taken by the executive and judicial branches to the neutrality statute. There the defendant was tried and convicted of selling arms in Tucson, Arizona, to Yaqui Indians who for some years had been carrying on an insurrection in Mexico. The Court of Appeals for the Ninth Circuit upheld the conviction on the ground that the Yaquis had come to Tucson to find a new source of supplies. In the court's view, once the Yaquis had secured arms they became an "organized unit,"¹⁸⁴ a military expedition which was destined to move from a neutral territory—in this case the United States—and thus the case came within the provisions of the statute. As Gandara had helped the Yaquis by supplying them with arms and ammunition to "set them on foot," he was guilty of a violation of the neutrality statute. Thus, whereas sale for export to a few individuals appears to have been permissible, sale directly to a group which was gathering resources for a cross-border raid was not. The test was whether the band came into United States territory to receive the arms and to organize themselves there as a group. The distinction drawn was that where United States territory was used as the site for arming the rebels for an incursion into a foreign territory, a violation of the statute occurred and thus the United States considered itself obliged to prosecute the guilty parties. Where the territory of the United States was used merely as the point of departure for the shipment of arms, no statutory violation was thought to have occurred.¹⁸⁵

In attempting to ascertain whether a state has breached its international duty some consideration must be given to its ability to prevent terrorist activities. As Garcia-Mora has stated, "present law clearly says that whether a state is to prevent the formation of a hostile expedition is inevitably limited by the capacity of the state, which must be interpreted as being as far as possibilities will reasonably permit."¹⁸⁶ Incidents relating to the civil war in Yemen generated considerable practice on this point. In 1963 the British Government

183. 33 F.2d 394 (9th Cir. 1929), *cert. denied*, 280 U.S. 612 (1930).

184. *Id.* at 395.

185. *United States v. Trumbull*, 48 F. 99 (S.D. Cal. 1891). The court in *Trumbull* ruled that "the sending of a ship from Chili [sic] to the United States, to take on board arms and ammunition purchased in this country, and carry them back to Chili [sic] is not . . . providing . . . the means for any military expedition . . . within the meaning of [the neutrality statute]."*Id.* at 103.

186. M. GARCIA-MORA, *supra* note 156, at 63.

adopted the position, in conformity with its non-intervention policy, of not permitting the use of the territory of the Federation of South Arabia by either side in the Yemeni civil war "as a springboard for an attack on the other side."¹⁸⁷ Yet, when inquiries were made in 1964 about its ability to stop gunrunning to Yemen, Great Britain replied: "[T]he nature of the country and the ill-defined border between the Yemen and the Federation of South Arabia make it quite impossible to control."¹⁸⁸

Article 13(1) of the Sohn and Baxter draft convention speaks of the duty of a state to "exercise due diligence" in protecting aliens by the use of "preventative or deterrent measures" to suppress criminal acts of individuals.¹⁸⁹ The language of their explanatory note is of interest. The authors assert:

A State not only has a duty to protect the aliens which are within its own territory, but it likewise has an obligation to protect aliens in the territory of other States from wrongful acts which may have their origin within territory under its control. A State is thus under an obligation to see to it that bands of bandits and marauders do not organize themselves within its territory and then cross its borders in order to do violence to the inhabitants of adjacent States.¹⁹⁰

The test to be applied in determining whether a state has fulfilled its obligation is again essentially the test of "due diligence."

A basic assumption underlying arguments sometimes advanced in cases involving transnational terrorism is that states from whence terrorists come should incur responsibility for their acts because as sovereign states they can prevent such activities. Bowett calls this assumption into question and concludes that it is "unrealistic" when applied to certain contemporary situations.¹⁹¹ Indeed, one may envision two situations in which it actually may be false. The first would be where in theory a government has the power needed to prevent the use of its territory for the perpetration of acts of terrorism in other states but, in view of popular sentiment, is unable to take measures which would curb such activities effectively. To do so would be tantamount to political suicide. The second situation would be where the state is totally incapacitated, in view of its resources and the size of its

187. [1963-I] BRITISH PRACTICE IN INTERNATIONAL LAW 26 (E. Lauterpacht ed. 1964). Likewise, it forbade the use of Hong Kong as part of a pipeline for the flow of explosives and napalm from Formosa to Southern China. *Id.* at 25.

188. [1964-II] BRITISH PRACTICE IN INTERNATIONAL LAW 187 (E. Lauterpacht ed. 1966).

189. See text accompanying notes 41-42 *supra*.

190. L. SOHN & R. BAXTER, CONVENTION, *supra* note 42, at 137.

territory, possessing no means of its own to oust the terrorist groups. While in the first instance the state may be unable politically to oust the terrorists, that sort of inability is not the type of incapacity which would immunize it from responsibility. Indeed, it is precisely this sort of factual setting to which the norms of state responsibility can be applied. The second situation, where a state actually has no ability to stop terrorists, foreign or otherwise, and might well have to risk disintegration in order to protect aliens, is another matter. When no reasonable possibilities exist for preventing the activities, it may be proper to conclude that "[i]mmunity follows inability."¹⁹² Eagleton has noted, however, that numerous awards have been assessed against states "on the ground that they had failed in their duties, even when they were incapable of performing them."¹⁹³

4. The pronouncements of the United Nations

In determining the character of the customary international law duty which is imposed on states not to allow their territories to be used for terrorist activities, the United Nations resolutions of the past few years cannot be ignored, especially since they may indicate the direction in which international law is moving in this area of state responsibility.

a. The Declaration on Friendly Relations

In 1970, after years of arduous debate, the United Nations General Assembly approved by consensus the Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States In Accordance with the Charter of the United Nations (Declaration on Friendly Relations).¹⁹⁴ It was the product of a special committee whose task was to establish seven fundamental precepts of international law. At least two statements in the Declaration on Friendly Relations are relevant to the present discussion; both state-

191. Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 20 (1972). See text accompanying notes 90-98 *supra*.

192. Otto Kummerow Case (Germany v. Venezuela), J. RALSTON, *supra* note 71, at 526, 559.

The commission ruled that no liability could be imposed on Venezuela for acts by revolutionaries during the civil war because the revolution had gone beyond the control of the titular government. Therefore, under the circumstances it would be an unjust expectation and contrary to principles of international law to hold the government responsible. *Id.*

193. C. EAGLETON, *supra* note 65, at 90.

194. G.A. Res. 2625, 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1970).

ments appear as part of the elaboration of the principle relating to the use of force. The first declares:

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.¹⁹⁵

The second states:

Every State has the duty to refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territories directed towards the commission of such acts, when the acts referred to in the present paragraph involve the threat or use of force.¹⁹⁶

One preliminary problem with the Declaration on Friendly Relations is its status under international law.¹⁹⁷ Rosenstock, a member of the United States delegation, has suggested that, between the two poles of being a mere recommendation or a binding statement of legal rules, the Declaration on Friendly Relations may be closer to the latter.¹⁹⁸ As a statement of international law, its significance is underlined by the intimate connection between its seven guiding principles and the United Nations Charter from which they were derived. Rosenstock further observes that the Declaration on Friendly Relations, addressed to "Every State," represents a restatement of the United Nations Charter, the rules of which now can be said to be binding on all states.¹⁹⁹

What the Declaration on Friendly Relations establishes substantively in regard to transnational terrorism, however, is the central issue here. The language of the first principle set out above seems clear; it places upon "Every State" the duty to refrain from abetting terrorist activities in any way. Moreover, the Declaration on Friendly Relations goes beyond placing restrictions on the affirmative acts of states, since under it states also may not "acquiesce" in the use of their territory by terrorists. These provisions, then, establish that

195. *Id.* at 123.

196. *Id.*

197. See generally J. CASTANEDA, *LEGAL EFFECTS OF UNITED NATIONS RESOLUTIONS* (1969); R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); Falk, *On the Quasi-Legislative Competence of the General Assembly*, 60 AM. J. INT'L L. 782 (1966).

198. Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 714-15 (1971).

199. *Id.* at 717.

states are not to aid or abet terrorists either within or without their territory.²⁰⁰

Statements made in the Sixth Committee and special committee proceedings concerning the Declaration on Friendly Relations necessarily reflect a given state's understanding of its meaning and should be considered as *travaux préparatoires*.²⁰¹ Therefore, a Syrian qualification seems significant, not for acts it would include but for acts it would exclude from the declaration's coverage. The Syrian delegate stated that the Declaration on Friendly Relations was not applicable to Palestinian terrorist raids into Israel supported by Arab states. The theory behind this qualification was that the Palestinians were fighting a "resistance" battle for occupied territories.²⁰² The Syrian qualification raises the troublesome and very complex issue of how to lessen the tension between the duty to refrain from the use or threat of force and the right of self-determination. This tension necessarily complicates the issue of state responsibility.

In short, the Declaration on Friendly Relations may be taken as reflecting norms of international law against which the behavior of states may be evaluated. Yet one cannot ignore the reservations expressed by states such as Syria to the applicability of the Declaration on Friendly Relations in certain contexts. Keeping those specific exceptions in mind, states may be considered to have subscribed to norms which require them to refrain from supporting terrorist activities affecting other states.

b. The Definition of Aggression

After several decades of discussion and debate, the United Nations General Assembly in 1974 adopted by consensus a Definition of Aggression.²⁰³ Its usefulness to this study is limited by its purpose. At first glance, article 3(g)²⁰⁴ would seem to have some application in the terrorist context. That article defines aggression as "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial

200. The Declaration on Friendly Relations left some important questions unanswered. For instance, it does not say what is and what is not terrorism. See generally note 1 & accompanying text *supra*.

201. Rusk, *The 25th U.N. General Assembly and the Use of Force*, 2 GA. J. INT'L & COMP. L. 19, 31 (1972).

202. See 24 U.N. GAOR 297, U.N. Doc. A/L.6/SR. 1160 (1969) (remarks of Mr. El-Attrash of Syria).

203. G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142, U.N. Doc. A/9631 (1974).

204. *Id.* at 143.

involvement therein."²⁰⁵ Yet, on further scrutiny, this definition seems to create more problems than it solves.

In the first place, while article 3(g) covers instances of actual state involvement in what may be construed as terrorist activities, it would apply only to the "sending by or on behalf of a State" of groups against other states. During the struggle to achieve consensus on this paragraph, which drew its original inspiration from a provision in the Declaration on Friendly Relations,²⁰⁶ such specific words as "organizing," "encouraging," "knowing acquiescence in," "assistance to" armed bands fell by the wayside in favor of the more objective but also more limited standard of "sending."²⁰⁷ Thus, while the Definition of Aggression may be more succinct, its coverage is more narrow and is sure to create confusion when compared with the Declaration on Friendly Relations. Secondly, nothing helpful is said about acquiescing in the use of territory for terrorist purposes. Granted article 3(f) does speak of the situation where one state puts its territory "at the disposal of" another state,²⁰⁸ but that language would not cover the typical terrorist situation, since terrorists usually are ordinary individuals and not representatives of a state. Third, insofar as the Definition of Aggression deals with the actual involvement of states in aggression (including, one may assume, acts of terrorism), it only speaks to the issue of state involvement or complicity. The Definition of Aggression is of little help on the subject of the negligence of states. Moreover, it ignores the difficulties which arise where the state lacks the knowledge or the ability to curb terrorist activities originating from within its territory. It does reinforce, however, the adequately established notion that acts of state terrorism will give rise to international responsibility.

c. *The Convention on the Protection of Diplomats*

Although in practice the duties arising under it relate to the protection of a special class of people, the normative statement set out in the recently formulated Convention on the Prevention and Punishment of Crimes Against Diplomatic Agents and Other Internationally Protected Persons (Convention on the Protection of Diplomats)²⁰⁹ is

205. *Id.*

206. See text accompanying notes 194-96 *supra*.

207. 2 B. FERENZ, *DEFINING INTERNATIONAL AGGRESSION* 39 (1975).

208. Article 3(f) of the Definition of Aggression characterizes as an act of aggression: "The action of a State in allowing its territory which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State." G.A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 143, U.N. Doc. A/9631 (1974).

209. G.A. Res. 3166, 28 U.N. GAOR, Supp. (No. 30) 146, U.N. Doc. A/9030 (1973).

another significant contribution to the clarification of the duty to prevent terrorism. The states parties under article 4(a) assume responsibility for "taking all practicable measures *to prevent preparations in their respective territories* for the commission of [terrorist] crimes within or outside their territories."²¹⁰ The formulation in the Convention on the Protection of Diplomats can be taken as a reflection of the developing customary norms relating to terrorism.

In conclusion, the work of the United Nations has reinforced the validity of the principles which govern state responsibility for terrorism. Its efforts have helped to restate the norms. By themselves, however, such efforts may not support the bringing of claims based upon terrorist acts. That is not overly crucial, for, as has been noted above,²¹¹ such claims and the legal principles on which they rest have become well-established under customary international law.

5. Summary and analysis

Whether a state will be responsible for terrorist activities originating from within its boundaries depends on the factual setting of the incident. It is certain that the standard of liability to be applied is not a *per se* rule: a state is not responsible for all terrorist activities of ordinary individuals within its borders. Indeed, there is considerable resistance to fashioning a rule of state responsibility on such a theory. When discussions began in the United Nations concerning transnational terrorism, the position taken by the Soviet Union was illustra-

The Organization of American States Convention to Prevent and Punish Acts of Terrorism (OAS Convention) appears to be the first multilateral treaty which speaks directly to the issue of permitting the use of territory as a base for terrorist operations in another state. In article 8 the parties to that convention agree:

To take all measures within their power, and in conformity with their own laws, to prevent and impede the preparations in their respective territories of [kidnapping, murder, assaults against the life or personal integrity, and extortion in connection with these crimes] that are to be carried out in the territory of another contracting State.

Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion That Are of International Significance, Feb. 2, 1971, T.I.A.S. No. 8413, O.A.S. Doc. AG/88 rev. 1 (1971), *reprinted in* 64 DEP'T STATE BULL. 231 (1971), *and in* 10 INT'L LEGAL MATERIALS 255 (1971). The 13 signatories are Colombia, Costa Rica, Dominican Republic, El Salvador, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, United States, Uruguay, and Venezuela. Yet, inasmuch as the OAS Convention applies only to injuries to persons owed a special duty of protection (diplomats), the duty does not cover those persons who are most often the targets or victims of such crimes, namely, ordinary aliens.

210. G.A. Res. 3166, 28 U.N. GAOR, Supp. (No. 30) 147, U.N. Doc. A/9030 (1973) (*emphasis added*).

211. See text accompanying notes 107-18, 125-93 *supra*.

tive of this view. Soviet Ambassador Malik stated that the Soviet delegation had already "stressed the inadmissibility of putting on the same footing, from the point of view of international law and responsibility, acts of terrorism committed by private groups of persons representing not States but only themselves and acts of aggression organized, planned and sanctioned by the Government of a State."²¹² Malik's observation has considerable merit. Certainly it would be unwise to assert, without careful and explicit elaboration, a theory under which states are held responsible for all terrorist acts of ordinary individuals. Yet Malik's observation must not be taken to mean that under no circumstances will a state be held responsible for terrorist acts of individuals, for that should not be, and of course is not, the case. As explained above,²¹³ where a state either involves itself actively in injurious activities or fails to fulfill its duty to prevent injuries therefrom, it incurs responsibility. Where states give support to nonlocal terrorism by permitting individuals to use their territory as bases for their operations, such states are engaging in unlawful conduct.

If the prevention of terrorist planning and training within their boundaries is a duty of states, breach of that duty would consist of the following four elements: first, knowledge or notice that the territory is being used as a base for terrorist operations (such knowledge may come by way of a complaint from another state or by virtue of the open and notorious nature of the terrorist activity); second, failure to exercise "due diligence" in curbing the activities once knowledge of the activities is acquired (at this point one of the features of the state's duty may be to apprehend and punish those persons involved in terrorist intrigues); third, omission in the exercise of the duty or inaction on the part of the state (this default may arise as a form of toleration or acquiescence on the part of the state in the use of its territory); and fourth, injury suffered by persons in another state (the injury would be evidence of the state's failure to live up to its duty, though not entirely dispositive of the question). The four elements relate to the duty as measured by the standard of "due diligence."

Saying that states are under a duty to exercise "due diligence" in

212. 27 U.N. SCOR (1662d mtg.) 5, U.N. Doc. S/p.v. 1662 (1972). Compare Huber's earlier remark: "Responsibility for the action or inaction of the public authorities is quite different from responsibility for acts imputable to individuals outside the influence of or openly hostile to the authorities . . ." British Property in Spanish Morocco Case, 2 R. Int'l Arb. Awards 615, 642 (1925) (authors' translation). See text accompanying notes 27-29 *supra*.

213. See text accompanying notes 63-118, 156-211 *supra*.

preventing the use of their territories for terrorist bases is relatively simple; proving that a state is in breach of that duty is quite another matter. Many distinctions must be made concerning the relationship between the state and the perpetrators of terrorist acts, since a number of different legal issues arise as this relationship varies. For example, the following questions must be carefully considered and answered: what was the origin of the terrorists' training; from whom was it received; what was their relationship to the state from whose territory they operated? (The difference between the Palestine Liberation Organization (PLO) and the Baader-Meinhof gang under international law may be illustrative). Moreover, there are questions which arise about the status of the so-called "host government": what was the relationship between the state from which the terrorists came and the target state; what was the nature or character of the specific target of the act; what was the nature and purpose of the act?

In short, states have a duty to refrain from allowing their territories to be used as bases for terrorist activities in other states, subject to the conditions set out above. Since the subject has been clouded by other factors in the past, such as the right of self-determination, it often may be difficult to bring a successful claim on such a basis. Yet, as Huber has stated, "a State cannot require another State, the interests of whose nationals have been injured, to remain indifferent if possibilities of providing assistance are, without good cause, clearly neglected or if the authorities, having been alerted in good time, fail to take preventive action . . ."²¹⁴ The difficulty lies in finding ways to make states live up to their duty in this area or accept international responsibility for failure to do so.

III. STATE RESPONSIBILITY FOR FAILURE TO APPREHEND, PUNISH, OR EXTRADITE TERRORISTS

While the acts of terrorists are usually front page material, word of their prosecution, punishment, or release—especially the latter—rarely is thought to be newsworthy. Unfortunately, it is increasingly common for states to adopt, either voluntarily or under threats of additional terrorist acts, a lenient policy toward the punishment of terrorists. While undeniably justified, the widespread indignation over the recent release by France of Abu Daoud, the Palestinian terrorist leader allegedly responsible for the deaths of the Israeli Olympic athletes in Munich,²¹⁵ was nevertheless somewhat selective. "Of the more than

214. British Property in Spanish Morocco Case, 2 R. Int'l Arb. Awards 615, 642 (1925) (authors' translation).

215. N.Y. Times, Jan. 12, 1977, § A, at 1, col. 1 (release by French court upon refusal

150 Palestinian terrorists who have been arrested in Western Europe in the past five years," Dr. Pierre has written, "all but nine . . . have been quietly released with or without trial."²¹⁶

Examples of leniency in punishing terrorists are plentiful. President Makarios is reported to have set free the eight Arab terrorists who, after attacking an Israeli plane in Cyprus on 9 April 1973, were sentenced to serve seven years in prison.²¹⁷ He did so, it is reported, in the hope that Cyprus would not be drawn into the Middle East conflict.²¹⁸ In the Rome airport incident, the two Arabs who unsuccessfully attacked Israeli passengers were arrested on 4 April 1973, but subsequently they were released and sent to Lebanon.²¹⁹ Later in 1973, two of five terrorists who were thwarted in their attempt to shoot down an Israeli airliner at Rome were released on their own recognizance pending trial before an Italian court. It came as no surprise that they immediately fled the jurisdiction.²²⁰

Two of the more notorious examples of leniency in punishing terrorists involved United States citizens and their property. The first incident took place in Khartoum, Sudan. On 2 March 1973, a group of eight Black September terrorists seized the Saudi Arabian Embassy and took hostages.²²¹ Before surrendering to local authorities, they murdered the United States Ambassador, one of his attaches, and a Belgian attache. All eight terrorists were arrested, charged with murder, and tried under Sudanese law. On 24 June 1974, they were convicted and sentenced to life imprisonment. The following day President Nimiery commuted their sentences to 7 years and ordered them turned over to the PLO.²²² The second incident arose out of

of requests from Israel and Germany that Daoud be detained pending formal extradition proceedings); *id.*, Jan. 13, 1977, § A, at 1, col. 1 (indignation in French press of the left, right, and center over Daoud's release); *id.*, Jan. 14, 1977, § A, at 1, col. 4 (French response to criticism was that judicial decision was made by an independent court and was therefore binding on the government; Prime Minister Barre stated that the government could review only court decisions granting extradition rights, not refusing them).

216. Pierre, *The Politics of International Terrorism*, 19 ORBIS 1251, 1264 (1976).

217. N.Y. Times, Dec. 20, 1973, at 16, col. 5.

218. *Id.*

219. *Id.*

220. *Id.*

221. Ironically, the objective of this attack was to secure the release from a Jordanian prison of Abu Daoud, the Palestinian terrorist recently arrested and then released by France. *Id.*, Jan. 12, 1977, § A, at 20, col. 1. See note 215 & accompanying text *supra*.

222. The Times (London), Mar. 2, 1973, at 1, col. 5 (terrorists seize embassy); *id.*, Mar. 3, 1973, at 1, col. 1 (terrorists kill United States ambassador and others); *id.*, Mar. 5, 1973, at 1, col. 5 (terrorists surrender); *id.*, Mar. 6, 1973, at 1, col. 2 (terrorists are charged); *id.*, Sept. 26, 1973, at 7, col. 2 (trial begins); N.Y. Times, June 25, 1974, at 1, col. 6 (terrorists are convicted, sentenced); The Times (London), June 26, 1974, at 8, col. 6 (sentence commuted, terrorists released to PLO).

the 18 December 1973 attack by Arab terrorists on a Pan American jet airliner at the Rome airport in which thirty-two persons were killed.²²³ After the attack, hostages were flown aboard a hijacked Lufthansa plane to Athens, where the terrorists demanded the release of two Palestinians imprisoned in that country. They then flew to Kuwait. The terrorists neither were extradited to states that sought them nor were tried under Kuwaiti law.²²⁴ Rather, they were handed over to the Arab Liberation Movement for having committed "crimes against the movement."²²⁵

These events have caused one commentator to suggest that "[a] State should be equally culpable as an accessory-after-the-fact if it permits free entry or safe passage when theoretically subject to international responsibility to punish or extradite terrorists."²²⁶ This suggestion, however, presupposes that under the customary international law norms of state responsibility such a duty already exists. Is there an international duty to apprehend, punish, or extradite persons who engage in terrorist acts so that, when states fail to live up to it, they incur responsibility? Part III analyzes, from the point of view of state practice, arbitral decisions, and attempts at codification, whether such a duty exists.

A. *The Duty to Apprehend and Punish Participants in Local Terrorism*

Because terrorist attacks tend to occur without warning—indeed, the element of surprise is one of their chief characteristics—normally there is little chance that a state will have sufficient knowledge to prevent the act. Absent some degree of involvement or manifest negligence on its part, the question thus becomes what steps a state is obliged to take to ensure that the perpetrators of the crime are apprehended and punished.

1. *The nature of the duty to apprehend and punish*

Commissioner Little in deciding the *DeBrissot & Others Case*,²²⁷ a decision of the United States-Venezuelan Claims Commission created

223. N.Y. Times, Dec. 18, 1973, at 1, col. 8 (attack by terrorists, flight to Athens with hostages); *id.*, Dec. 20, 1973, at 1, col. 1 (flight to Kuwait); *id.*, Dec. 24, 1973, at 3, col. 1 (release to Arab Liberation Movement).

224. Italy, Morocco, West Germany, and the United States sought their extradition. See N.Y. Times, Dec. 20, 1973, at 1, col. 1.

225. *Id.*, Dec. 24, 1973, at 3, col. 1.

226. Slomanson, *supra* note 7, at 125.

227. 3 ARBITRATIONS, *supra* note 67, at 2949.

by the Convention of 5 December 1885,²²⁸ set out the standard formula for testing a state's accountability in such situations: "Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could be reasonably required in that behalf, she is to be held blameless; otherwise not."²²⁹ A similar test emerged from the *Janes Case*,²³⁰ one of the most widely cited cases in the law of state responsibility. *Janes* is the focal point of attention because its holding crystallized the legal precepts regarding a state's responsibility for failure to prosecute and punish individuals who commit crimes against aliens within its territory.

The General Claims Commission (United States and Mexico) decided the *Janes Case* under the Convention of 8 September 1923.²³¹ Janes, the superintendent of the El Tigre Mines near Sonora, had been murdered on 10 July 1918 by an employee whom he recently had dismissed. Although the Mexican authorities had eyewitness information, they did almost nothing to apprehend and punish the slayer. On these facts, a claim was brought alleging that Mexico had breached its duty under international law. The argument advanced by the United States stressed the complicity of the Mexican Government: by failing to apprehend and punish the murderer, Mexico had approved of the crime, and thereby assumed responsibility for the crime itself. While recognizing that there were cases where the complicity theory might serve as a basis for imposing liability on a state—as when a state knew of the intention to commit the crime and encouraged it or did nothing to prevent it—the General Claims Commission concluded that the facts in *Janes* suggested a different theory of responsibility:

The present case is different; it is one of nonrepression. Nobody contends either that the Mexican Government might have prevented the murder of Janes, or that it acted in any other form of connivance with the murderer. The international delinquency in this case is one of its own specific type, separate from the private delinquency of the culprit. The culprit is liable for having killed or murdered an American national, the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender. . . . Even if the non-punishment were conceived as some kind of approval—which

228. 12 C. BEVANS, *supra* note 68, at 1085.

229. 3 ARBITRATIONS, *supra* note 67, at 2968.

230. *Janes Case* (United States v. Mexico), [1927] Opinions 108, 4 R. Int'l Arb. Awards 82 (1927).

231. 9 C. BEVANS, *supra* note 68, at 935.

in this Commission's view is doubtful—still approving of a crime has never been deemed identical with being an accomplice to that crime²³²

Thus the Commission based Mexico's liability squarely upon "the Government's negligence . . . resulting from the nonpunishment of the murderers."²³³ The decision also referred to the levels of omission which, under appropriate circumstances, may be treated as breaches of a state's duty: no prosecution at all; prosecution followed by release; prosecution but light punishment; and prosecution, imposition of punishment, and then pardon.²³⁴

In the *Neer Case*,²³⁵ the General Claims Commission sharpened the distinctions established in other opinions²³⁶ by pointing out, in relation to the state responsibility issue, the vast difference between a determination that local authorities could have been more efficient in their investigation, and a determination that definitely indicates a lack of "due diligence" amounting to a breach of international law. The Commission there denied the claim presented to it, observing that to establish liability the behavior of the government "should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of the international standard that every reasonable and impartial man would readily recognize its insufficiency."²³⁷

The statements made in the *Janes* and *Neer* cases to the effect that, while a duty to apprehend and punish individuals who commit crimes that injure aliens exists, states can satisfy this standard of behavior by displaying "diligence" or demonstrating that they have done what was "reasonably required," were reinforced in the clarification made of the rule arising out of the *Janina* incident. As noted earlier,²³⁸ some confusion arose in regard to the rule relating to state responsibility for the deaths in the Tellini mission, and the League of Nations established a

232. *Janes Case* (United States v. Mexico), [1927] Opinions 108, 114, 4 R. Int'l Arb. Awards 82, 87 (1927).

233. *Id.* at 115, 4 R. Int'l Arb. Awards at 87.

234. *Id.* at 116, 4 R. Int'l Arb. Awards at 88.

235. *Neer Case* (United States v. Mexico), [1926] Opinions 71, 4 R. Int'l Arb. Awards 60 (1926).

236. Cf. text accompanying notes 70-72 *supra* (discussing *Poggio Case*) and accompanying notes 227-29 *supra* (discussing *DeBrissot & Others Case*). See also Bovallins & Hedland Cases, 10 R. Int'l Arb. Awards 768 (1903); J. RALSTON, *supra* note 71, at 952.

237. *Neer Case* (United States v. Mexico), [1926] Opinions 71, 73, 4 R. Int'l Arb. Awards 60, 61-62 (1926).

238. See text accompanying note 56 *supra*.

special Committee of Jurists to clarify the matter. State responsibility would attach, the Committee of Jurists observed, only "if the State has neglected to take all reasonable measures" pertaining to the pursuit, arrest, and punishment of the individuals involved.²³⁹

2. Attempts to codify the duty to apprehend and punish

The Preparatory Committee of the Hague Conference built upon state practice and the work of arbitral tribunals by proposing, as its Basis of Discussion Number 18, a rule which would have created state responsibility when a state "failed to show such diligence in detecting and punishing the author of the damage as, having regard to the circumstances, could be expected"²⁴⁰ During the Hague Conference, the above provisions were added to a composite text which was hotly contested. In its relevant part, the composite text read: "A State is responsible for damage caused by a private person to the person or property of a foreigner if it has failed to take such preventive or punitive measures as in the circumstances might properly be expected of it."²⁴¹ This text eventually was shelved and replaced by another text, based upon the one adopted by the Institute of International Law at Lausanne,²⁴² which would have imposed state responsibility for damage to foreigners resulting "from the fact that the State has failed to take such measures as in the circumstances should normally have been taken to . . . inflict punishment for the acts causing the damage."²⁴³ Although the text was approved by a vote of 21-17-2 by the Subcommittee of the Third Committee,²⁴⁴ the entire Hague Conference did not adopt it.

The draft convention prepared in 1929 by the Harvard Research in International Law Project,²⁴⁵ in anticipation of the Hague Conference, also is relevant to the discussion of the duty to apprehend and punish persons who engage in terrorist acts. As defined in article 9, a denial of justice exists, *inter alia*, when there is a "gross deficiency in the administration of the judicial or remedial process," or a "failure to provide those guarantees which are generally considered indispensi-

239. 3 LEAGUE OF NATIONS O.J. 524 (1924).

240. League of Nations Publication, L.N. Doc. C/75/M/69 at 67 (V. Legal 1929).

241. 4 Acts of the Conference for the Codification of International Law 143, Minutes of the Third Committee, League of Nations, L.N. Doc. C/351(c)/M/145(c) (V. 1930).

242. 33 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 331 (1927-III).

243. 4 Acts of the Conference for the Codification of International Law 175, Minutes of the Third Committee, League of Nations, L.N. Doc. C/351(c)/M/145(c) (V. 1930).

244. *Id.* at 190.

245. Harvard Research in International Law Project, *supra* note 37, at 131.

ble to the proper administration of justice."²⁴⁶ The comment to the article advanced the view that the approach of the *Janes*²⁴⁷ and *Chattin*²⁴⁸ cases was too narrow.²⁴⁹ Included among the examples of denial of justice were failure to apprehend a criminal, executive or legislative interference with the freedom or impartiality of the judicial process, negligently permitting a prisoner to escape, refusal to prosecute an apprehended fugitive, and the premature pardon of a convicted offender.²⁵⁰ Article 11 placed responsibility on the state for injuries to aliens resulting from the act of an individual or from mob violence "if the state has failed to exercise due diligence to prevent such injury and if local remedies have been exhausted without adequate redress for such failure, or if there has been a denial of justice."²⁵¹ The comment emphasized the liability of a state where there is "implied complicity" in the injurious act "by an implied, tacit or constructive approval in the negligent failure . . . to investigate the case, or to punish the guilty individual, or to enable the victim to pursue his civil remedies against the offender."²⁵²

When Garcia-Amador formulated his views on state responsibility under the auspices of the International Law Commission,²⁵³ his draft articles paid particular attention to instances where a state was negligent in apprehending, prosecuting, or punishing persons directly responsible for an injury to an alien. The state's duty was split between two separate articles. The first, article 7(3), set out the duty of the state in "apprehending the individuals" responsible for the injury. If the state were shown to be inexcusably negligent in carrying out this duty, it would be responsible to the extent that the alien was deprived of an opportunity to pursue a claim against the individuals who had injured him.²⁵⁴ The liability of the state in this context would be based upon the acts it had taken or, perhaps more accurately, had failed to take, to ensure that the alien had recourse to

246. *Id.* at 134.

247. See notes 231-34 & accompanying text *supra*.

248. *Chattin Case (United States v. Mexico)*, [1927] Opinions 422, 425, 4 R. Int'l Arb. Awards 282, 285 (1927).

249. Harvard Research in International Law Project, *supra* note 37, at 174-75.

250. *Id.* at 175.

251. *Id.* at 188.

252. *Id.* at 189.

253. See notes 38-40 & accompanying text *supra*.

254. [1961] 2 Y.B. INT'L L. COMM'N 47, U.N. Doc. A/CN.4/134 + Add. 1. Under Article 7(3), the state also would be responsible if by "general or specific amnesty" the injured alien were deprived of an opportunity to pursue a claim against the individuals who had injured him. *Id.*

civil remedies.²⁵⁵ Secondly, article 8(2) covered the state's duty in applying criminal sanctions: "[T]he State is likewise responsible . . . if the authorities were manifestly and inexcusably negligent in the prosecution, trial and punishment of the persons guilty of the injurious act."²⁵⁶ This article did not require that the injured alien show any additional deprivation arising from the failure to prosecute or punish. Thus it differed from the preceding article regarding the basis upon which state responsibility could be engaged. Article 7(3) is predicated upon the inability of an alien to pursue a civil remedy against the persons responsible for his injury. Article 8(2) serves another purpose: to ensure that those persons responsible for the injury are subjected to criminal prosecution and punishment.

While Garcia-Amador was working on state responsibility for the International Law Commission, Professors Sohn and Baxter of Harvard completed their draft convention.²⁵⁷ The language they employ in the first portion of article 13(2) is fairly traditional: "Failure to exercise due diligence to apprehend, or to hold after apprehension as required by the laws of the State, a person who has committed against an alien any [criminal] act referred to in . . . this Article is wrongful . . ."²⁵⁸ The language used in the final portion, however, introduces an important qualification. Failure to exercise "due diligence" to apprehend or prosecute is wrongful only "to the extent that such conduct deprives that alien or any other alien of the opportunity to recover damages from the person who has committed the act."²⁵⁹ This qualification is based upon a rationale similar to that advanced by Garcia-Amador for article 7(3) of his draft convention: that the alien's only possible interest in the matter is a pecuniary one, a suit for damages.²⁶⁰ Under this "limited rule," however, a state could not escape liability entirely just by exercising "due diligence" in ap-

255. Thus where a state is negligent in apprehending, prosecuting, or punishing persons directly responsible for injuring an alien Garcia-Amador predicates liability upon the deprivation of recourse to civil remedies rather than upon the notional injury supposedly flowing from the state's failure to prosecute the alleged wrongdoer. Similarly, Professors Sohn and Baxter would qualify state responsibility for failure to exercise due diligence to apprehend or prosecute a person who has committed a criminal act against an alien by finding such failure to exercise "due diligence" wrongful only to the extent that the alien is deprived of the opportunity to recover damages from the person who committed the act. See text accompanying notes 259-61 *infra*.

256. [1961] 2 Y.B. INT'L L. COMM'N 47, U.N. Doc. A/CN.4/134 + Add. 1.

257. See note 42 *supra*.

258. L. SOHN & R. BAXTER, CONVENTION, *supra* note 42, at 134-35.

259. *Id.* at 135.

260. See notes 254-55 & accompanying text *supra*.

prehending criminal assailants, since according to Sohn and Baxter it would not "foreclose the possibility that a State-to-State responsibility, lying outside the scope of this Convention, may exist in [cases of failure to prosecute or punish]."²⁶¹

In the past decade the International Law Commission, with Dr. Ago serving as Special Rapporteur, has attempted once again to codify the principles of state responsibility. Ago's original draft article 11, which imposed a "prevent or punish" duty upon states,²⁶² has been considerably weakened by the International Law Commission in its latest version.²⁶³ It is doubtful whether the end product of this codification attempt will prove particularly helpful in the terrorism context.

3. *Degree of state involvement in the failure to apprehend, prosecute, and punish perpetrators of local terrorism*

a. *The duty to apprehend*

The rule in the *Neer Case*²⁶⁴ demonstrates that a state is accorded some leeway in apprehending persons responsible for acts such as terrorism. Whether or not the duty of apprehension has been met must be decided by reference to the specific circumstances of each case. Where there is a failure to apprehend based upon either negligence or inattention on the part of the state, the state generally will be held responsible. The General Claims Commission (United States and Mexico) consistently applied this rule.²⁶⁵ As *Neer* makes plain, responsibility will not arise simply because the steps taken were not as active or as efficient as might have been expected. The *Austin Case*,²⁶⁶ however, added a qualification to the above rule. There an award was made where it clearly was impossible for the Mexican authorities to apprehend the murderer because he had fled into rebel territory. The Commission nevertheless held that a denial of justice

261. L. SOHN & R. BAXTER, CONVENTION, *supra* note 42, at 139.

262. See text accompanying note 44 *supra*.

263. See text accompanying note 45 *supra*.

264. *Neer Case* (United States v. Mexico), [1926] Opinions 71, 4 R. Int'l Arb. Awards 60 (1926). See text accompanying note 237 *supra*.

265. *Gorham Case* (United States v. Mexico), [1930] Opinions 132, 4 R. Int'l Arb. Awards 640 (1930); *Corcoran Case* (United States v. Mexico), [1929] Opinions 211, 4 R. Int'l Arb. Awards 470 (1929); *Newman Case* (United States v. Mexico), [1929] Opinions 284, 4 R. Int'l Arb. Awards 518 (1929); *Stallings Case* (United States v. Mexico), [1929] Opinions 224, 4 R. Int'l Arb. Awards 478 (1929); *Catalina de Diaz Case* (Mexico v. United States), [1926] Opinions 143, 4 R. Int'l Arb. Awards 106 (1926).

266. *Austin Case* (United States v. Mexico), [1930] Opinions 108, 4 R. Int'l Arb. Awards 623 (1930).

had occurred, since the authorities, although faced with attenuating circumstances, had done nothing whatsoever in the matter.²⁶⁷

The *Texas Cattle Claims*,²⁶⁸ adjudicated by the American-Mexican Claims Commission, also are of interest here. The American-Mexican Claims Commission defined eight types of wrongful acts for which Mexico could be held responsible, including failure to punish persons guilty of crimes against United States nationals or their property. The language of the Commission is particularly significant to the duty to apprehend terrorists, for it imposes responsibility on Mexico because by "knowingly giving the criminals asylum in Mexico, [the Mexican Government] encouraged them to continue their crimes"²⁶⁹ The record before the Commission indicated a long history of failure on the part of government officials to prevent the raiders from filtering back and forth across the border. In the *Dexter Case*,²⁷⁰ which specifically pertained to a state's responsibility for the failure to apprehend and prosecute murderers, a suspect, arrested in connection with the murder of a United States national in Mexico, confessed and implicated eight other persons. The Commission found no satisfactory explanation for the failure to apprehend or punish them, concluding that "the conduct of the Mexican authorities in the investigation of these crimes and in the punishment of the persons implicated therein constitutes such an utter indifference to the performance of their duties as clearly to impose liability on the Mexican Government under well recognized principles of international law."²⁷¹

Also relevant is the *Bernadotte Case*,²⁷² which is unique in that it does not involve two states, but one state and the United Nations.²⁷³ Count Bernadotte, who at the time was the United Nations mediator for Palestine, and a Colonel Serot, a United Nations observer, were shot and killed while in Israeli territory by members of the so-called

267. For criticism of this decision, see A. FELLER, THE MEXICAN CLAIMS COMMISSION 151 (1935).

268. AMERICAN-MEXICAN CLAIMS COMMISSION, *supra* note 142, at 51; 8 WHITEMAN, DIGEST, *supra* note 88, at 749. See notes 142-46 & accompanying text *supra*.

269. AMERICAN-MEXICAN CLAIMS COMMISSION, *supra* note 142, at 66; 8 WHITEMAN, DIGEST, *supra* note 88, at 751.

270. AMERICAN-MEXICAN CLAIMS COMMISSION, *supra* note 142, at 264; 8 WHITEMAN, DIGEST, *supra* note 88, at 755-56.

271. 8 WHITEMAN, DIGEST, *supra* note 88, at 756.

272. *Id.* at 742-44.

273. Strictly speaking, the *Bernadotte Case* may not have involved a state, but rather a de facto government. According to one author, the Israelis at this time had not been recognized as a government, although they were in control of the territory. Wright, *Responsibility for Injuries to United Nations Officials*, 43 AM. J. INT'L L. 95, 99-100 (1949).

Stern Gang. Through the Secretary-General, the United Nations protested the incident and demanded reparations, basing its claim in part upon the failure to apprehend and punish the assassins. Though the Israeli Government admitted that there were "a number of gaps and omissions" in the police inquiry, it was careful, in making payment, to avoid admitting any complicity in the incident. Nevertheless, a statement of regret for not having apprehended the persons responsible for the murders accompanied a \$54,628 payment to the United Nations.²⁷⁴

Various examples highlight the practical difficulties in applying the apprehension rule. One of the best illustrations is the state practice growing out of the murder of a group of Mexican shepherds near Nueces, Texas, in 1875. After the incident, the Mexican Government lodged a claim with the United States Department of State for damages. The United States, through Secretary of State Fish, acknowledged a duty to prosecute the offenders "according to law," but conditioned such a duty on the proper fulfillment of criminal law procedures.²⁷⁵ In this instance, the United States maintained that the peculiarities of its criminal justice system required that the arrest be based upon an affidavit from a credible witness. Although there was ample evidence that the culprits were well known locally, no such witness came forth and consequently it was impossible to prosecute them. The United States used this theory in an attempt to shield itself from liability based upon negligence in pursuing its acknowledged duty to prosecute offenders "according to law." In later exchanges of letters, Secretary of State Fish tried to reinforce his position by arguing that because Texas was so large and police were so scarce "prevention, detection, and punishment of crime is difficult, if not, at times, impossible."²⁷⁶ Moreover, he asserted that inasmuch as the border was frequented by vagabond fugitives "those who voluntarily seek residence or resort thither must be presumed to be aware of the risks thus incurred."²⁷⁷ The Department of State never varied

274. 8 WHITEMAN, DIGEST, *supra* note 88, at 742.

275. Letter from the Secretary of State to the Mexican Legation to the United States (Feb. 19, 1875), *reprinted in* [1875] 2 FOREIGN REL. U.S. 973, 974.

276. Letter from the Secretary of State to the Mexican Legation to the United States (Mar. 18, 1875), *reprinted in* [1875] 2 FOREIGN REL. U.S. 980.

277. *Id.* In another context, Secretary of State Fish wrote that even treaties between countries to protect persons and property were "notoriously inoperative in quarters remote from the seat of government." Letter from the Secretary of State to Mr. Haplin (Mar. 13, 1873), *reprinted in* 6 J.B. MOORE, *supra* note 132, at 677.

its position that there were insufficient legal grounds to support a denial of justice claim.²⁷⁸

Neither inefficiency nor the inability to apprehend is, however, by itself a basis for state responsibility. Only the taking of reasonable bona fide steps to catch the culprits is required.²⁷⁹ Thus states will not be responsible for the mere inability to capture terrorists. Indeed, it would be foolish to insist that the duty is breached in such cases. As long as reasonable measures are being taken to investigate the terrorist acts and seek out those persons responsible for them, this part of the duty to apprehend has been satisfied. In short, states must do what is "reasonably required" to apprehend.²⁸⁰ Whether or not a state has complied with its duty will be judged on the basis of its exercise of "due diligence." "Lack of diligence," "wilful neglect," and "inaction" are all phrases that could be invoked to establish a state's responsibility for failure to apprehend terrorists.

b. *The duty to prosecute*

The jurisprudence of the General Claims Commission (United States and Mexico) contains a number of cases on the subject of the duty to prosecute. Some of these cases indicate that it is not enough merely to begin the process of prosecution. For example, an award was made in the *Galván Case*²⁸¹ because the murderer of a Mexican citizen, although he had been indicted, never was tried. Similarly, in the *Chase Case*²⁸² the General Claims Commission granted an award where the assailant was arrested, released on bond, and never brought to trial. In making the award, the Commission stated: "International justice is not satisfied if a Government limits itself to instituting and prosecuting a trial without reaching the point of defining the defendant's guilt and assessing the proper penalty."²⁸³ There may be

278. See 2 F. WHARTON, INTERNATIONAL LAW DIGEST 620-21 (2d ed. 1887).

279. Cf. text accompanying notes 90-98 *supra* (arguing that the means available to the state to suppress terrorism mitigates the duty to prevent such acts).

280. See text accompanying notes 227-29 *supra*.

281. *Galván Case* (Mexico v. United States), [1927] Opinions 408, 4 R. Int'l Arb. Awards 273 (1927).

282. *Chase Case* (United States v. Mexico), [1928] Opinions 17, 4 R. Int'l Arb. Awards 337 (1928).

283. *Id.* at 19, 4 R. Int'l Arb. Awards at 339. Other cases in which awards were made for failure to prosecute include: *Boyd Case* (United States v. Mexico), [1929] Opinions 78, 4 R. Int'l Arb. Awards 380 (1929); *Mecham Case* (United States v. Mexico), [1929] Opinions 168, 4 R. Int'l Arb. Awards 440 (1929); *Almaguer Case* (United States v. Mexico), [1929] Opinions 291, 4 R. Int'l Arb. Awards 523 (1929); *Canahl Case* (United

instances, however, where a genuine lack of evidence precludes bringing a particular defendant to trial. When such a decision is made by local authorities in light of the evidence at their disposal, it is difficult to find that a breach of duty to prosecute has occurred.²⁸⁴

State practice relating to the 1937 attack on the Italian consul at Chambéry, France,²⁸⁵ provides additional precedent on the duty to apprehend and prosecute. In this incident, after the wrongdoers had been taken into custody and proceedings had been instituted against them, the criminal process was suspended when an amnesty law was proposed. Following Italian Government protests, the matter was referred to the Legal Department of the French Ministry of Foreign Affairs, which prepared a memorandum exploring the legal implications of the French handling of the matter. In that memorandum, allusion was made to the obligation to prosecute as set out by the special Committee of Jurists established by the Council of the League of Nations,²⁸⁶ and to the special duty owed a consul as enunciated in the *Mallén Case*:²⁸⁷ "A State cannot relieve itself of this obligation under international law by recourse to its legislation, for example an amnesty law . . . even much less a draft amnesty law and a ministerial circular."²⁸⁸ The legal advisor to the French Ministry of Foreign Affairs concluded that the Italian Government would have the right to submit the matter to arbitration. A refusal to arbitrate on the part of the French Government, he cautioned, would place France in the position of contradicting her own general policy in regard to the arbitration of such claims.²⁸⁹ Eventually, Italy could submit the dispute to the Permanent Court of International Justice, in which case France undoubtedly would lose. Therefore, the French authorities were advised to take "the offenders before a competent court without delay," and to see to it that "the sentences handed down were enforced as soon as possible."²⁹⁰

States v. Mexico), [1928] Opinions 90, R. Int'l Arb. Awards 389 (1928); Harkrader Case (United States v. Mexico), [1928] Opinions 66, 4 R. Int'l Arb. Awards 371 (1928).

284. Chase Case (United States v. Mexico), [1928] Opinions 17, 19-20, 4 R. Int'l Arb. Awards 337, 339 (1928). But cf. text accompanying notes 67-69 *supra* (discussing *Glenn Case*). As one author has written: "Only a person plausibly guilty should be tried, and only a person really guilty should be convicted." Borchard, *Recent Opinions of the General Claims Commission, United States and Mexico*, 25 AM. J. INT'L L. 739 (1931).

285. 3 A. Kiss, *supra* note 32, at 615.

286. See text accompanying note 56 *supra*.

287. Mallén Case (Mexico v. United States), [1927] Opinions 254, 257, 4 R. Int'l Arb. Awards 173, 175 (1927). See note 51 *supra*.

288. 3 A. Kiss, *supra* note 32, at 615.

289. *Id.*

290. *Id.* Presumably they took this advice.

i. Escape or release

The *Corcoran Case*²⁹¹ is of particular interest in the context of the escape or release of terrorists since it discussed the duty to reapprehend and punish an escaped prisoner. In *Corcoran*, the actual "escape" was facilitated by jail officials, which revealed, in the understated words of the Commission, "a situation with respect to the administration of justice that is below the standards prescribed by international law."²⁹²

Of similar cases, the *Youman Case*²⁹³ is perhaps the most trenchant. There Mexican soldiers were sent to disperse a mob which was attacking a house in which some United States nationals had sought refuge. Rather than quiet the disturbance, the soldiers joined the mob, fired at the house, and killed the occupants. Although approximately 1,000 people were present, only eighteen were arrested, several of whom were released on personal recognizance and never reapprehended. The prosecution of six other persons was discontinued, and those persons given reduced sentences "escaped." Undoubtedly, the principal rationale for imposing responsibility on Mexico was the involvement of its soldiers in the killings. Yet, one of the elements on which the General Claims Commission (United States and Mexico) relied in its decision was the patent lack of "due diligence" in prosecuting and punishing those persons involved.

ii. Acquittal

The corollary to the "case law" just discussed is that a state will not incur responsibility simply because a trial fails to terminate in a conviction.²⁹⁴ Yet if the acquittal evidences some sort of mismanage-

291. Corcoran Case (United States v. Mexico), [1929] Opinions 211, 4 R. Int'l Arb. Awards 470 (1929).

292. *Id.* at 212, 4 R. Int'l Arb. Awards at 471. See also Massey Case (United States v. Mexico), [1927] Opinions 228, 4 R. Int'l Arb. Awards 155 (1927).

293. Youman Case (United States v. Mexico), [1927] Opinions 150, 4 R. Int'l Arb. Awards 110 (1927).

294. Gordon Case (United States v. Mexico), [1930] Opinions 50, 4 R. Int'l Arb. Awards 586 (1930); Willis Case (United States v. Mexico), [1929] Opinions 325, 4 R. Int'l Arb. Awards 544 (1929). In both cases, the claims based upon the nonpunishment of offenders were rejected even though the judge had acquitted the offenders and his decision had been affirmed on appeal.

In the Pears Case (United States v. Honduras), a sentry in Honduras who shot and killed the victim later was acquitted when a local court found that "the act of shooting was, under all the circumstances, lawful and innocent." 1 WHITEMAN, DAMAGES, *supra* note 74, at 65. The curious feature of the incident was that even before the trial Honduras set aside, and eventually paid, \$10,000 in gold to the United States. This aspect of the case caused Whiteman to quote from *Through the Looking Glass*: "As the Queen

ment or incompetence, the question of responsibility may arise.²⁹⁵

The possibility that a court will acquit defendants, even when the evidence against them appears conclusive, is of course a real one. Just such a result occurred in the *Worowski* incident.²⁹⁶ Conradi, the man who shot the Soviet diplomat, was arrested and held for trial under Swiss law. The Swiss authorities stated that they could not be responsible beyond that point. Amidst a tense diplomatic atmosphere, the *Cour d'assises* acquitted Conradi in November of 1923. Later the Soviet Government protested that the Swiss authorities, "once the crime had been committed, did all in [their] power to allow the criminals to escape with impunity."²⁹⁷ Acquittal by itself, however, would not seem to provide a basis for the imposition of state responsibility. There would have to be more—at a minimum, a showing that the state unduly influenced the judicial process.

iii. *Amnesty*

One of the most thoroughly documented practices which can give rise to state responsibility is the granting of amnesty to individuals who have caused injuries to aliens. In the past, amnesty usually was given as a consequence of internal civil strife.²⁹⁸ As the following discussion demonstrates, the "case law" concerning the effect of a grant of amnesty on the duty to prosecute and the duty to punish²⁹⁹ appears on first impression to be as clear as it is substantial.

The *Cotesworth & Powell Case*,³⁰⁰ a decision of the British-Colombia Mixed Commission in 1875, is representative of the body of law concerning amnesty and demonstrates the basis upon which a theory of state responsibility is laid. Two statements in the arbitral award are of interest. First, the Commission noted in its decision that

explained to Alice: 'There's the King's messenger. He's in prison now, being punished; and the trial doesn't even begin till next Wednesday; and of course the crime comes last of all.' " *Id.* at 66.

295. See, e.g., Stephens Case (*United States v. Mexico*), [1927] Opinions 397, 4 R. Int'l Arb. Awards 265 (1927). In this case, a young Mexican soldier, on patrol after a revolutionary uprising and under orders to stop a car, fired at the auto and killed its passenger, a United States national. The soldier was taken prisoner, but was mistakenly released by his military officer, who had been ordered to discharge the auxiliary forces under his command. The officer was acquitted on appeal. Mexico was found responsible for the incompetence with which the situation was handled, and pecuniary damages were awarded to the victim's family.

296. See text accompanying notes 57-62 *supra*.

297. K. FURGLER, *supra* note 57, at 60.

298. See generally Akehurst, *supra* note 85, at 56-60.

299. On the duty to punish, see text accompanying notes 321-35 *infra*.

300. 2 ARBITRATIONS, *supra* note 67, at 2050.

"[o]ne nation is not responsible to another for the acts of its individual citizens, *except when it approves or ratifies them.*"³⁰¹ Such approval, according to the Commission, can be inferred from a refusal to provide a means of reparation when such is possible, or from its pardon or amnesty of the offender when such pardon or amnesty necessarily deprives the injured party of all redress.³⁰² Second, the Commission ruled that to assess responsibility on such a basis was merely to adhere "to the well-established principle in international polity, that, by pardoning a criminal, a nation assumes the responsibility for his past acts."³⁰³ The statements of the Commission, however, create some confusion as to whether the state, by granting amnesty, actually becomes the author of the individual's act, as it were, and thus responsible for the act itself, or whether responsibility attaches because the granting of any amnesty violates an international duty separate from the offenses committed by the individuals—the duty of states to apprehend and punish those individuals who are responsible. In any event, the Commission was sure that responsibility arose.

The Montijo Case,³⁰⁴ decided by the United States-Colombia Commission in 1874, provides additional support for holding a state responsible for granting amnesty to individuals who have caused injury to aliens. *The Montijo*, a ship flying the United States flag, was seized by revolutionaries during a voyage to Panama, but while still within the jurisdiction of Colombia. The persons seizing the vessel, who were attempting to overthrow the government of Panama, held *The Montijo* in their possession for sixty-two days. The revolt was settled with a treaty of peace between the President of Panama and the revolutionary leader under which amnesty was granted to those

301. *Id.* at 2082 (emphasis added).

302. *Id.*

The words pardon and amnesty were both used in the opinion, and properly so. There were two types of liability involved—one of a criminal and one of a civil nature. The criminal charges against ex-Judge Salazar were dismissed under the amnesty laws enacted in 1860 and 1863. Yet the Colombian trial court first held him liable civilly, imposing the sentence, then later "pardoned" his civil liability. *Id.* at 2079. Perhaps the *Cotesworth & Powell Case* unduly confuses the pardon/amnesty distinction: an amnesty is granted prior to the imposition of a sentence and before the issue of the person's guilt has been determined; a pardon usually connotes that the culpable party already has been found guilty and then is exempted from punishment for the crime he has committed.

303. *Id.* at 2085. In the Bovallins & Hedlund Cases (Sweden & Norway v. Venezuela), the umpire of the Mixed Swedish and Norwegian Claims Commission similarly considered a de facto amnesty a tacit approval of the rebels' acts. 10 R. Int'l Arb. Awards 768 (1903); J. RALSTON, *supra* note 71, at 952.

304. 2 ARBITRATIONS, *supra* note 67, at 1421.

persons who had seized the ship.³⁰⁵ Mr. Robert Bunch, the British arbitrator of the United States-Colombia Commission, in setting out the grounds for decision, took the position that "‘even in the absence of any express stipulation to that effect, the grantor of an amnesty assumes as his own the liabilities previously incurred by the objects of his pardon toward persons and things over which the grantor has no control.’"³⁰⁶

The amnesty issue also was considered in the *West Case*,³⁰⁷ where a claim was brought by the father of a man killed by bandits in 1922 while taking a payroll to a Mexican oil field. The murder, as the General Claims Commission (United States and Mexico) observed, was "void of political background."³⁰⁸ Shortly after the death, however, the Mexican Government issued a decree of amnesty which covered this act of banditry. In discussing the effect of the amnesty act, the Commission took the position that it was not its task to interpret the act—the murder could not have been deemed an act of revolutionaries—but to accept the construction given to it by the Mexican Government. Thus, it concluded that "[t]here would seem no doubt but that granting amnesty for a crime has the same effect, under international law, as not punishing such a crime, not executing the penalty, or pardoning the offense. If proven it fastens upon Mexico an indirect liability."³⁰⁹

There are, however, exceptions to this general rule. In the *Devine Case*,³¹⁰ an arbitral tribunal refused to find state responsibility and observed that "[o]ther governments, including that of the United States, have pardoned rebels, but they have not on this account engaged to reimburse to private individuals the losses caused by those rebels."³¹¹ Two similarly untoward precedents are found among the work of the Special Claims Commission (United States and Mexico). One involved a decision regarding liability for an attack on a train by Villistas forces which resulted in the death of several United States nationals. In 1920 the Mexican Government had granted amnesty to Villa's forces. In denying the claim before it, the Special Claims Commission said that in view of the "long years of serious disturbances" the granting of amnesty in return for a laying down of arms

305. *Id.* at 1428.

306. *Id.* at 1438.

307. *West Case* (United States v. Mexico), [1927] Opinions 404, 4 R. Int'l Arb. Awards 270 (1927).

308. *Id.* at 404, 4 R. Int'l Arb. Awards at 270.

309. *Id.* at 405, 4 R. Int'l Arb. Awards at 271.

310. 3 ARBITRATIONS, *supra* note 67, at 2980.

311. *Id.* at 2981.

"cannot be looked upon as an act of lenity," but rather was to be regarded as a "supreme effort for achieving . . . the pacification of the country . . ."³¹² Regarding the Villistas forces as belligerents, the British-Mexican Claims Commission (Great Britain and Mexico) called the same arrangement "an act of political expediency."³¹³ The same Commission, however, did "make clear that they [were] not speaking here of acts such as wanton murder or other crimes committed with no possible legitimate excuse or reason of military necessity."³¹⁴

To summarize with regard to the duty to prosecute, once a state has the terrorists in hand, the duty attaches. If the person charged with a crime is permitted to "escape" through the aid of some government official, the duty has been breached.³¹⁵ Naturally, efforts must be made to bring those persons who have been apprehended to trial, but whether or not a person should stand trial would seem to be decided by the principles of criminal law operative in the particular country. In at least one case, the General Claims Commission (United States and Mexico) exonerated the Mexican Government for nonprosecution because there was a lack of evidence.³¹⁶ In a more contemporary context, the question of whether the Italian Government could be held responsible for the two times it released terrorists in 1973 prior to trial³¹⁷ is an open one. Certainly, more facts are needed concerning their release: one pair of terrorists was freed and sent to Lebanon, the other pair jumped bail and failed to appear for trial. From the information available, however, lack of "due diligence" probably could be shown and a claim presented for failure to prosecute.

Two problems always involved in cases concerning the duty to prosecute are the latitude of discretion to give to the prosecuting authorities and the motives for the release. As suggested in *Chase*,³¹⁸ local authorities have some leeway in deciding not to prosecute where there is little evidence linking the person in custody with the crime. Moreover, where terrorists are freed as part of a deal to obtain the release of hostages, some relaxation of the state's duty to prose-

312. 5 G. HACKWORTH, *supra* note 30, at 547.

313. *Id.*

314. *Id. See also* Santa Isabel Claims (United States v. Mexico), [1926] Opinions 1, 4 R. Int'l Arb. Awards 783 (1926).

315. See notes 291-93 & accompanying text *supra*.

316. Costello Case (United States v. Mexico), [1929] Opinions 252, 4 R. Int'l Arb. Awards 496 (1927).

317. See notes 219-20 & accompanying text *supra*.

318. Chase Case (United States v. Mexico), [1928] Opinions 17, 4 R. Int'l Arb. Awards 337 (1928). See text accompanying notes 282-84 *supra*.

cute should be forthcoming given the essentially humanitarian reasons for their being freed, namely, saving the lives of innocent hostages.

Equally difficult to resolve for purposes of state responsibility are cases where an alleged terrorist is tried and acquitted, as in the *Worowski* incident in Switzerland.³¹⁹ Theoretically, one could argue that the state has an international duty either to punish the accused or to accept responsibility for neglecting that duty. Yet an acquittal in the normal course of events would not be evidence of negligence or dereliction of duty, since by bringing the accused to trial the state normally would be regarded as having done what is reasonably expected of it. Indeed, the state cannot guarantee a conviction. In the absence of evidence that it has intervened in the trial to ensure acquittal, the state would not be responsible, for, assuming an impartial decision-making process, the judicial systems of states must be left to work on their own. Of course, an argument can be made that the quality of justice in many states,³²⁰ particularly when their nationals are on trial for terrorist activities in which aliens have been injured or killed, is suspect. Making a successful claim on that basis, however, may be difficult at best and often next to impossible absent, of course, some fairly strong evidence of executive intervention in the judicial process.

c. The duty to punish

Once a terrorist is apprehended, tried, and convicted, a state still has a duty to impose adequate punishment. While there is little doubt that such a duty exists, the "case law" has taken contradictory positions as to what is adequate punishment according to international standards. For example, in the *Putnam Case*³²¹ a convicted murderer of a United States national was sentenced to death. An appellate court commuted the sentence to one to eight years of hard labor. The General Claims Commission (United States and Mexico) held that such a modification of the sentence was not sufficient to support a claim that the international duty to punish had been breached. In a similar vein, a presidential reversal of a court-martial of a United States officer, who had accidentally shot and mortally wounded a young Mexican girl as she was crossing the Rio Grande in

319. See text accompanying notes 57-62 *supra*.

320. See generally Study of Equality in the Administration of Justice, U.N. Doc. E/CN.4/Sub.2/296/Rev.1 (1972).

321. *Putnam Case* (United States v. Mexico), [1927] Opinions 222, 4 R. Int'l Arb. Awards 151 (1927).

contravention of United States law, was not considered a breach of the international duty.³²²

In the *Kennedy Case*,³²³ on the other hand, the General Claims Commission made an award to a claimant when the man who had shot and seriously injured him had been given only a two-month prison term. In the *Morton Case*,³²⁴ moreover, the same Commission found liability where the murderer had been sentenced to a term of four years imprisonment, but actually never served the sentence.

The *Denham Case*,³²⁵ decided by the United States-Panamanian General Claims Commission in 1933, is even more illustrative, principally because its facts more closely approach situations which have arisen over the treatment of terrorists. The murderer of a United States national was arrested promptly, tried, and sentenced to a prison term of eighteen years and four months. After having served 3½ years of his term, however, the legislature granted the convicted criminal a general amnesty, in effect, a pardon.³²⁶ Since there was no doubt that the duty of the state had been fulfilled initially—the wrongdoer had been arrested, tried, convicted, and adequate punishment had been imposed—the only issue was whether the punishment, cut short by the legislative grant of amnesty, was sufficient. Although the Commission in assessing damages gave some recognition to the fact that the state had partially fulfilled its duty, on the issue of liability it held that the punishment was not adequate: "In arriving at the measure of liability, the Commission has taken into account the fact that [the convicted criminal] was actually imprisoned for a period of slightly more than three years. There was not a total failure to punish."³²⁷ *Denham* appears to be one of the rela-

322. García & Garza Case (Mexico v. United States), [1926] Opinions 163, 4 R. Int'l Arb. Awards 119 (1926).

323. Kennedy Case (United States v. Mexico), [1927] Opinions 289, 4 R. Int'l Arb. Awards 194 (1927).

324. Morton Case (United States v. Mexico), [1929] Opinions 151, 4 R. Int'l Arb. Awards 428 (1929). Other Commission cases which address the failure to punish adequately are: Sewell Case (United States v. Mexico), [1930] Opinions 112, 4 R. Int'l Arb. Awards 626 (1930); Connolly Case (United States v. Mexico), [1928] Opinions 87, 4 R. Int'l Arb. Awards 387 (1928); Youman Case (United States v. Mexico), [1927] Opinions 150, 4 R. Int'l Arb. Awards 110 (1927); Roper Case (United States v. Mexico), [1926] Opinions 205, 4 R. Int'l Arb. Awards 145 (1926); Swinney Case (United States v. Mexico), [1926] Opinions 131, 4 R. Int'l Arb. Awards 98 (1926).

325. Denham Case (United States v. Panama), [1933] Opinions 244, 6 R. Int'l Arb. Awards 312 (1933).

326. The amnesty/pardon distinction is discussed in note 302 *supra*.

327. Denham Case (United States v. Panama), [1933] Opinions 244, 245, 6 R. Int'l Arb. Awards 312, 313 (1933).

tively rare cases where this distinction—partial as opposed to total fulfillment of the obligation—has been made.³²⁸

Examples of another aspect of the duty to punish are found among state practice. The 1899 murder of Frank W. Lenz, a United States citizen traveling in Turkey, had all the earmarks of premeditation, yet the murderers were tried on a lesser charge under local law. The lighter punishment meted out to the wrongdoers, however, never was imposed because they escaped.³²⁹ The case of Charles W. Renton is similar to *Lenz*. Renton, a United States citizen living in Honduras, was murdered, and his wife and niece were kidnapped. The facts again pointed to premeditation, but the trial of the persons responsible resulted in conviction for minor offenses. After sentences were imposed, the culprits again escaped.³³⁰ In both *Lenz* and *Renton*, compensation was paid in settlement of the claims. Thus, where the guilty parties escape after the imposition of sentences, state responsibility may arise.

In cases such as *Denham*, the state has fulfilled its duty to apprehend and prosecute. The question then arises as to whether a breach of the duty to punish follows from failure to carry out the punishment in whole. Recent practice presents some dramatic instances posing this issue. The trial and sentencing to life imprisonment of the eight persons responsible for the deaths in Khartoum followed by the subsequent commutation of the terrorists' sentences to seven years and their immediate release to the PLO is a striking example.³³¹ Makarios' release of the eight Arab terrorists who had been sentenced to seven years in prison for attacking an airliner in Cyprus is another classic case.³³² These releases, in light of the severity of the terrorist acts involved, certainly could be construed to constitute the "outrage," "bad faith," and "wilful neglect" mentioned in *Neer*,³³³ thus supporting international claims based upon state responsibility principles.

In many instances, although on the basis of available information

328. Partial punishment as a mitigation of damages played a role in the Adams Case, also decided by the United States-Panamanian General Claims Commission, where inadequate punishment had been levied against a policeman who was guilty of robbing and shooting a United States citizen. Adams Case (United States v. Panama), [1933] Opinions 305, 6 R. Int'l Arb. Awards 321 (1933).

329. 6 J.B. MOORE, *supra* note 132, at 792. This and other claims were settled in 1901 by an agreement between Turkey and the United States. *Id.* at 794.

330. *Id.* at 794-99.

331. See text accompanying notes 221-22 *supra*.

332. See text accompanying notes 217-18 *supra*.

333. See text accompanying note 237 *supra*.

probably not in the two cases just discussed, states may argue that they have released terrorists prematurely only under duress occasioned by, for example, threats from terrorist groups to carry out additional terrorist acts unless their compatriots were set free. Here competing interests must be balanced with care. Given the fact that a Greek ship and its crew were being held hostage in Pakistan, one may understand Greece's reasons in 1974 for freeing Palestinian terrorists who had been sentenced to death.³³⁴ A practical, political decision, based upon immediate humanitarian concerns, obviously had been made. Yet Greece may have breached, at least technically, the norms of international law. In any event, it released convicted terrorists, entailing potential future human rights deprivations. The trade-offs that will be required to fashion and apply a rule of international law in such cases are obvious, even if the answers to all the questions raised in this subsection are not.³³⁵

B. The Duty to Apprehend and Punish Individuals Responsible for Nonlocal Terrorism

The principles governing the duty to apprehend and punish tend to fit the facts of those incidents which arise within the boundaries of a given state. Since the crime occurs there, jurisdiction clearly exists, and more importantly there is a basic interest in pursuing and punishing the criminal. The state has authority to act and therefore any omission or inaction may be classified properly as a breach of the state's international duty in this regard. As far as the legal precepts are concerned, this duty is fairly well-defined and is not limited by

334. N.Y. Times, Feb. 4, 1974, at 3, col. 1.

335. A not unrelated question involving similar trade-offs arises when a state either refuses to negotiate with terrorists or gives in to their demands and the terrorists proceed to take the lives of hostages. The murder in 1975 of United States Consul Egan by Montoneros guerrillas in Cordoba, Argentina, is a case in point. See text accompanying note 21 *supra*. Egan's murder followed the refusal of the Argentine Government to produce on national television several guerrillas held prisoner. The question is whether state responsibility should arise in such a case based upon the theory that Argentina unreasonably refused to do what was necessary to secure Egan's release.

Certainly where a state acts recklessly, thus contributing to the deaths of hostages, a strong case can be made out for liability applying state responsibility principles. See note 112 & accompanying text *supra*. Absent recklessness, however, the answer to the above question is less obvious. If the sole demand of terrorist kidnappers, for instance, was for the publication of their views in a leading newspaper, a state's refusal to do so, followed by the deaths of hostages, arguably might render it liable. Refusal to respond to more severe demands, such as the release of imprisoned terrorists or the payment of large sums of money in ransom, probably would not. In all such cases, a careful balancing of interests would be required before bringing a claim based upon the alleged violation of state responsibility principles.

other principles of international law. Such is not the case, however, where the crime is committed within one state and the wrongdoer flees to another state for safe haven. At that point, the duty to apprehend and punish essentially becomes hostage to the doctrines of asylum and extradition.³³⁶

1. Asylum and acts of terrorism

Asylum, in the traditional formal sense, has been used as an instrument of state craft for granting safe haven to persons who flee from one to another country for political reasons. In recent years, it has been invoked increasingly in cases involving persons who maintain that the crimes they have committed are political acts entitling them to refuge. The link between the practice of granting asylum and nonlocal transnational terrorism is most apparent in the case of aerial hijackings.³³⁷ Of such incidents up to 1974 which terminated in a state other than the one in which the airplane was seized, some seventy percent resulted in asylum being granted to the hijackers.³³⁸

In deciding to whom they will grant asylum, states have what amounts to "absolute discretion."³³⁹ There apparently are no principles of customary international law which limit the grant.³⁴⁰ The International Court of Justice in the *Asylum Case*,³⁴¹ for instance, observed in 1950 that "the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any consistent and uniform usage accepted as law."³⁴² Developments since then have clarified the matter but little.

Article 14(1) of the Universal Declaration of Human Rights, for instance, states only that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."³⁴³ The right, however,

336. Since these doctrines are generally familiar ones, they need no extended elaboration for purposes of this section. What will be emphasized here are the basic principles governing these doctrines and their application to situations involving terrorist activities. On the doctrines generally, see, e.g., S. SINHA, ASYLUM AND INTERNATIONAL LAW (1971); I. SHEARER, EXTRADITION IN INTERNATIONAL LAW (1971).

337. N. JOYNER, AERIAL HIJACKING AS AN INTERNATIONAL CRIME 185-96 (1974).

338. *Id.* at 186.

339. Green, *Extradition v. Asylum for Aerial Hijackers*, 10 ISRAEL L. REV. 207, 208 (1975).

340. Green, *The Right of Asylum in International Law*, 3 MALAYA L. REV. 223 (1961); S. SINHA, *supra* note 336, at 18, 155. Conventional international law limitations may be emerging. See text accompanying note 379 *infra*.

341. Colombia v. Peru, [1950] I.C.J. 266.

342. *Id.* at 277.

343. G.A. Res. 217A, U.N. Doc. A/810, at 74 (1948).

is one for the accepting state to bestow. Surely it should be granted only when the fugitive truly is seeking political asylum and not just trying to avoid prosecution for a terrorist act. Article 14(2) seemingly draws such a distinction. The right is not extended to "*prosecutions genuinely arising from non-political crimes* or from acts contrary to the purposes and principles of the United Nations."³⁴⁴

The United Nations Convention on Refugees³⁴⁵ further underscores the above distinction and makes it part of conventional international law. By article 1(f), the provisions of the convention are made specifically inapplicable to:

any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a *serious non-political* crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.³⁴⁶

It is evident that persons seeking asylum will look to states which are most interested, politically or otherwise, in the purposes and effects of the act that they have committed within the state from which they are fleeing. The accepting state may decide to grant asylum for a number of reasons, from political self-interest to the upholding of human rights values. Once this decision has been made, the matter essentially is settled. Other states have few means at their disposal to secure the return of the fugitive, short of invoking principles of extradition as set forth in bilateral and occasionally multilateral treaties. Even that route, as will be seen below,³⁴⁷ is far from promising. State responsibility norms, while certainly not irrelevant, apparently have not been invoked to date in any of the numerous cases where states have granted terrorists asylum.³⁴⁸

344. *Id.* (emphasis added).

345. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 195. As of 1 July 1976, 66 states were parties to the convention. The Protocol Relating to the Status of Refugees, Jan. 31, 1967, [1968] 4 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, incorporates the Convention on Refugees' substantive provisions and extends its coverage to persons becoming refugees as a result of events occurring after 1 January 1951. As of 1 July 1976, 60 states, including the United States, were parties to the protocol.

346. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 195 (emphasis added).

347. See text accompanying notes 349-76 *infra*.

348. See text accompanying note 338 *supra*.

2. *Extradition and acts of terrorism*

Although Grotius took the position that under natural law states had a duty either to punish fugitive offenders who were found within their territories or to surrender them to the other states, no such legal obligation ever developed.³⁴⁹ The present general rule as to extradition can be stated succinctly: extradition is the prerogative of the state in which the fugitive is found. In the absence of a treaty between the requesting and accepting states, there is no legal duty under international law to extradite.³⁵⁰ Where a treaty does exist, the offenses for which extradition can be granted usually are limited to specifically listed ones. Even if the offense for which the particular extradition is sought is listed, however, the "political offense" exception found in most extradition treaties may come into play. In all cases, the decision whether to extradite or not essentially rests with the "national government of a State."³⁵¹

It is under the rubric of the "political offense" exception that the practice of asylum and extradition join. As the late Judge Lauterpacht has written, "[w]e are confronted with the impressive fact that in the legislation of modern states there are few principles so universally adopted as that of non-extradition of political offenders."³⁵² A brief examination of selected domestic court cases may help to illustrate the confusing impact the "political offense" exception has had on extradition practice.

The first is the *Pavelic & Kwaterwick Case*,³⁵³ where France requested the extradition of two men implicated in the 1934 murder of King Alexander of Yugoslavia and the French Foreign Minister. The Italian court held that they had committed a nonextraditable political crime because they had acted for political purposes and their act had been directed against the interests of a foreign state. The decision reflects the school of thought that views a terrorist attack on a head of state as the quintessential "political offense."³⁵⁴

The Italian court in *Pavelic* applied a slightly different approach from the one developed by the courts of Great Britain. In *Re*

349. 2 H. GROTIUS, *supra* note 125, ch. 11, § 4.

350. Of course, there is no rule which forbids a state from surrendering a fugitive voluntarily if it wishes to do so. See Green, *supra* note 339, at 211.

351. 6 WHITEMAN, *DIGEST*, *supra* note 88, at 727.

352. Lauterpacht, *Laws of Nations and the Punishment of War Crimes*, 21 BRIT. Y.B. INT'L 58, 88 (1944).

353. *Pavelic & Kwaterwick*, 7 Ann. Dig. 372 (Ct. App. Italy 1934).

354. See generally Harvard Research in International Law, *Draft Convention on Extradition*, with Comment, 29 AM. J. INT'L L. SUPP. 15, 112-19 (1935).

Castioni,³⁵⁵ the Queen's Bench held that in order to constitute a political offense, and thus bar extradition, the act must have occurred within the context of a struggle between two parties fighting for control of the government of a state. In *In re Meunier*,³⁵⁶ the Queen's Bench read this rule strictly, excluding anarchists from the "political offense" exception since by definition they were directing their acts against the general body of citizens—against all governments, as it were—rather than against a particular government. By analogy to *In re Meunier*, terrorists should fall outside the "political offense" exception. It is true that in recent years British courts, like their counterparts in the United States,³⁵⁷ have relaxed the requirement that to constitute a political offense the acts involved must have occurred during a political uprising, especially when the acts in question were committed by persons fleeing a totalitarian regime.³⁵⁸ Yet there has been no indication in the case law of either Great Britain or the United States that ordinary terrorists—say, of the Baader-Meinhof type—could claim the benefits of the "political offense" exception.

Three recent cases from Canada, Great Britain, and Greece support this construction of the applicability of the "political offense" exception to requests for extradition of terrorists. In *Re State of Wisconsin and Armstrong*,³⁵⁹ the United States sought the extradition from Canada of a man charged with bombing four buildings at the University of Wisconsin in 1972. The extraditee opposed the application on the theory that the offenses were of a "political character," since they were acts of protest against United States involvement in the Vietnam War. The extradition judge hearing the application noted that, contrary to what had been claimed, no classified research

355. [1891] 1 Q.B. 149, 156.

356. [1894] 2 Q.B. 415, 419.

357. See, e.g., *In re Gonzalez*, 217 F. Supp. 717 (S.D.N.Y. 1963).

358. *Ex parte Kolczynski*, [1955] 1 All E.R. 31, where Poland unsuccessfully sought the extradition of seven Polish sailors who had seized a Polish trawler and brought it into a British port, is the leading case. According to an authority on British extradition law, *Kolczynski* "marked an extension of the categories of political offenses to limits to be determined, apparently, only by broad considerations of humanity. This case can be regarded as the high water mark of liberality in the determination of the limits of a political offense by British courts." I. SHEARER, *supra* note 336, at 173.

Other states have adopted the same approach as Great Britain when faced with demands to extradite persons who have fled totalitarian regimes. Thus, in *Re Kavir, Bjelanovic & Arsenijevic*, 19 Ann. Dig. 371 (Federal Tribunal of Switzerland 1952), Switzerland refused to extradite three pilots who had hijacked an airliner from Yugoslavia.

359. 28 D.L.R.3d 513 (1972).

had been taking place on the campus, and held that the bombings, which had caused the death of one person, had no political connotations of the type which would bring the "political offense" exception into play. The court of appeals affirmed, holding that the extradition judge was

clearly justified in declining to conclude on the evidence before him that the applicant was involved in political activities which led to the offences in question . . . [Moreover,] there was ample evidence before him upon which he could conclude that the applicant [was] not a political fugitive but simply a fugitive from justice in respect of the offences in question in their ordinary aspect.³⁶⁰

*Cheng v. Governor of Pentonville Prison*³⁶¹ is the second recent case of interest. Cheng, a Formosan, was convicted of the attempted murder of Chiang Kai-shek's son in New York on 24 April 1970. After conviction, he fled to Sweden, which finally acceded to the request by the United States for his extradition. While being flown back to the United States he became ill. His plane was diverted to London and court proceedings over his extradition ensued. Ultimately, the House of Lords, looking again at the "political offense" exception, concluded that it could be invoked by a fugitive only when his act arose out of political opposition to the state requesting his extradition. In the words of Lord Hodson:

[M]embers of political organizations may commit all sorts of infractions of the criminal law in the belief that by so doing they will further their political ends, but these crimes do not automatically become offences of a political character . . . Political character in its context, in my opinion, connotes the notion of opposition to the requesting state. The applicant was not taking political action vis-à-vis the American government and the American government is not concerned with the relations between America and Taiwan in asking for extradition but is concerned only with enforcing the criminal law.³⁶²

Thus Cheng was extradited.

The most recent case in point was decided by the Supreme Court of Greece in October 1976 and involved Rolf Pohle, a member of the Baader-Meinhof terrorist group. Pohle, who in 1974 had been tried, convicted, and sentenced to six years imprisonment by West Ger-

360. 32 D.L.R.3d 265 (1973). For a lengthy analysis of this case, see Note, *Asylum or Accessory: The Non-Surrender of Political Offenders by Canada*, 31 U. TORONTO FACULTY L. REV. 93 (1973).

361. [1973] 2 All E.R. 204 (H.L.).

362. *Id.* at 207.

many, had been freed the following year in exchange for a West Berlin politician who had been kidnapped by the group. In July 1976, after his arrest in Athens, West Germany sought to extradite Pohle to serve out his prison term. The court of appeal in Athens, in what has been described as a "precedent-setting decision,"³⁶³ held that "his acts were those of a genuine revolutionary, and that they were not a criminal but a political offense."³⁶⁴ Hence it denied the extradition request. The Supreme Court of Greece promptly reversed the court of appeal "by adopting a very narrow definition of a political crime, taking it to cover only actions aiming directly at overthrowing the existing system, not all those prompted by political ideas or motives."³⁶⁵ The similarity between this holding and the Anglo-American decisions discussed above is striking.³⁶⁶

In light of these domestic court decisions, it would appear that many states regard terrorism, however politically motivated it is claimed to be, as not falling within the "political offense" exception. Unfortunately, many states oppose this view, which if more widely followed would facilitate extradition and hence the punishment of terrorists.³⁶⁷

The use of the "political offense" exception thus presents a significant barrier to attempts to extradite terrorists. Yet it does not usually come into play for the simple reason that most transnational terrorists, able to escape the jurisdiction in which their attack has been made, seek asylum in states having no extradition treaties with potential extraditing states. Moreover, in almost all such cases, asylum is sought in states where political ideals which correspond to the views of the terrorists are accepted, or where at least there is some sympathy for their cause.

363. Wash. Post, Oct. 4, 1976, § A, at 24, col. 1.

364. *Id.*

365. The Economist, Oct. 9, 1976, at 65, col. 2. Specifically, "[i]t ruled that two of the counts on which the prisoner had been convicted—participation in a gang and forgery—were not political." The Times (London), Oct. 2, 1976, at 4, col. 1.

The Supreme Court of Greece also rejected Pohle's argument that his release from prison in 1975 had amounted to a reprieve, holding that West Germany's freeing him "under blackmail did not forfeit its claim that he should serve the balance of his prison sentence." *Id.*

366. See text accompanying notes 355-58 *supra*.

367. In addition to certain Middle East countries that make a practice of granting safe haven to terrorists, a good many states elsewhere have longstanding expansive views of what constitutes a political offense. The attitude of the Latin American states is a case in point. See, e.g., *Re Campora*, 24 I.L.R. 518, 520 (S. Ct. Chile 1957) ("a political offence is one involving any attempt against the political organization of the State or the political rights of its citizens, that is, an attack upon the constitutional order of the country concerned").

The massacre at the Rome airport³⁶⁸ is the paradigm of the type of occurrence under discussion. Once the terrorists reached their place of asylum in Kuwait, they virtually were assured of escaping extradition. Although Italy, Morocco, West Germany, and the United States sought to have the members of the group extradited for trial and punishment, Kuwait was under no international legal duty to grant their requests for the simple reason that it had no extradition treaties with the requesting states. Indeed, Kuwait retorted, for good measure, that the act was of a political character.

Given the present international political climate, it may be wishful thinking to argue that Kuwait could be held to have breached an international obligation. Yet an argument can be made supporting such a view. In fact, several authors have suggested such an approach with regard to harboring of fleeing terrorists. Slomanson proposes that elements of an international tort be constructed to cover such occurrences.³⁶⁹ Kutner argues that states should be put on constructive notice that failure to prosecute and punish persons who commit international crimes—here he would include acts of terrorism, including hijacking—would involve those states as principals in the crime for having aided and abetted.³⁷⁰ Green asserts that within the context of terrorist hijackings, while there may be both criminal and political elements to the crime, the criminal elements so outweigh the political that extradition ought to be granted.³⁷¹ Bassiouni suggests that hijacking and terrorism, however politically connected they may be, should be considered *delicti jus gentium* and thus not subject to vagaries of the “political offense” exception.³⁷²

The above approaches to contemporary international law, at least

368. See text accompanying note 219 *supra*.

369. Slomanson, *supra* note 7, at 156-57. “A General Assembly resolution should recommend that its Members establish the duty to punish or extradite, based upon the mere presence of perpetrators of specific international terrorist crimes.” *Id.* at 157.

370. Kutner, *supra* note 7, at 340, 348. Kutner states that “[w]hether there exists a duty on the part of world nations to prosecute or extradite terrorists for proper disposition, depends on the general acceptance by the world community of the various conventions and agreements setting forth those duties and responsibilities.” *Id.* at 335.

371. Green, *supra* note 339, at 215.

372. Bassiouni, *Ideologically Motivated Offenses and the Political Offenses Exception in Extradition—A Proposed Juridical Standard for an Unruly Problem*, 19 DE PAUL L. REV. 217, 241 (1969). Cf. Paust, *A Survey of Possible Legal Responses to International Terrorism: Prevention, Punishment, and Cooperative Action*, 5 GEO. J. INT'L & COMP. L. 431, 454 (1975) (“political asylum should not be granted to international terrorists, since the offense is against mankind and not merely against a particular state or geopolitical system”). See generally M. BASSIOUNI, *INTERNATIONAL TERRORISM AND POLITICAL CRIMES* (1975).

according to traditional views, remain essentially *de lege ferenda*.³⁷³ Failure to extradite transnational terrorists, while offering an attractive basis for claiming that a state responsibility norm has been violated, has not yet been recognized as a basis for such an international claim absent the existence of a treaty.³⁷⁴ Arguably, it should be, but at present states simply may have to "rely upon the goodwill of the requested state" in extraditing terrorists.³⁷⁵ Similarly, failure to apprehend and punish transnational terrorists, while also an attractive basis for imposing state responsibility obligations, has not been recognized as generating international liability in the absence of a treaty commitment condemning the particular terrorist act and creating a specific duty of prosecution or extradition.³⁷⁶

C. Summary and analysis

The review of international law sources contained in this part of the article³⁷⁷ suggests that states are under certain duties with respect to the apprehension, prosecution, and punishment of terrorists. Failure to comply with these duties may give rise to claims based upon traditional state responsibility principles.

The ease with which the duty may be imposed depends upon whether local or nonlocal terrorism is involved. The duty applies most clearly to cases arising within the borders of a single country; that is, where both the terrorist act and the arrest, trial, and punishment take place in one state. On the other hand, where the act oc-

373. Even the advocates of state responsibility for harboring terrorists seem to admit that their approaches are essentially *de lege ferenda*. See notes 369-70 & accompanying text *supra*.

374. Indeed, the United States has been trying for the past five years to establish a "basic extradite-or-prosecute obligation" insofar as terrorists are concerned. 67 DEP'T STATE BULL. 444 (1972).

375. Green, *supra* note 339, at 211. In writing about the Hungarian-Yugoslav dispute over the assassination of King Alexander, Kuhn stated:

It would be futile to attempt to settle responsibility for the assassination of King Alexander under any purely legalistic procedure. The real issue is not whether a state is *obligated* to suppress activity subversive of the order of a foreign state, but whether it values peace with its neighbors sufficiently to *wish* to control within its jurisdiction acts which endanger good relations and to which it would object if committed against itself.

Kuhn, *supra* note 147, at 91.

376. See Paust, *supra* note 372, at 451-55. But see Bassiouni, *Methodological Options for International Legal Control of Terrorism*, 7 AKRON L. REV. 388, 391 (1974) ("The duty to prosecute or extradite is well established in international criminal law and has its origin in a maxim by Hugo Grotius . . ."). The maxim by Grotius is referred to in the text accompanying note 349 *supra*. See also text accompanying note 379 *infra*.

377. See text accompanying notes 215-376 *supra*.

curs in one country and the terrorist flees to another country, the existence of the duty, if any, is clouded by the customary international law practice concerning asylum and extradition. The comments that follow focus on terrorist acts of the local variety.

As to the duty to apprehend, state responsibility will not arise simply because the terrorist is not apprehended. A state is required only to take reasonable measures to investigate the crime and to seek out those persons responsible. Where evidence of wilful neglect or lack of "due diligence" emerges, however, state responsibility will be found to exist.

The duty to prosecute is not so all-inclusive as to require that those persons apprehended necessarily be convicted. Acquittals naturally will occur in any independent judicial process. Where a state permits an alleged terrorist to remain free or allows him to escape after arrest, however, responsibility ensues. When a state interferes with the prosecution process, such as by influencing witnesses, responsibility also arises. The duty essentially is to see that persons who commit wrongs against aliens are prosecuted. Where persons on trial are acquitted, responsibility will not arise unless the state has engaged in some form of misconduct.

Whether or not the punishment given the guilty parties falls below international standards is determined by reference to the circumstances of each case. The duty is couched in such terms as to seek to ensure that the punishment is adequate. Where punishment is not adequate, as in the case where the sentence is given but never served or where the sentence is reduced to derisively low levels, liability also will be found to exist.

To say that a duty exists and to pursue an international claim based upon state responsibility successfully are two vastly different matters. Yet state practice does reveal that damages have been paid for such claims. It must be acknowledged in all frankness, however, that whether compensation can be obtained in a given case depends largely on the attitude of the alleged wrongdoing state. In the past, states often recognized their responsibility or, more frequently, agreed to establish international tribunals to determine the issue. The difficult problem in today's terrorist context is that states to which responsibility normally would be assigned will neither admit responsibility nor enter into agreements establishing international fora to resolve the dispute. Many such states tend to be renegades over which international law appears to have little influence. For example, there is every indication that Libya consistently accepts fleeing

terrorists,³⁷⁸ and, as it usually has no extradition treaty with the state seeking their return, little can be done to achieve compensation from Libya for persons injured by the terrorists. Libya simply would contend that it is under no duty to prosecute or extradite, and hence has violated no state responsibility norms. Nevertheless, diplomatic protests certainly are in order. If made in sufficient number over a period of years, such protests may contribute to the development of a new—and needed—rule of customary international law requiring the prosecution or extradition of transnational terrorists.³⁷⁹

IV. CONCLUSIONS AND RECOMMENDATIONS

Since the article includes three “summary and analysis” subsections,³⁸⁰ it is unnecessary to reiterate here the specific legal conclusions already made therein. Instead, the following seven points set out in overview form the general conclusions flowing from the article. Interspersed with these general conclusions are various recommendations which the United States and likeminded governments may wish to consider in developing a common policy to combat transnational terrorism of the local and nonlocal variety.

1. Since the overriding policy of most states is to discourage transnational terrorism, they should utilize all available techniques to prevent terrorist acts and to punish their perpetrators. A strong stand by

378. See '*Carlos' Said to Go to Libya In a Deal With Terrorists*', N.Y. Times, Jan. 1, 1976, at 2, col. 1; *Libyans Arm and Train World Terrorists*, *id.*, July 16, 1976, § A, at 1, col. 1.

379. Recent conventions covering aerial hijacking and internationally protected persons embody an extradite-or-prosecute duty: a state party, if it does not extradite an alleged offender, is obligated to submit his case “without exception whatsoever to its competent authorities for the purpose of prosecution.” (Hague) Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, art. 7, [1971] 22 U.S.T. 1641, T.I.A.S. No. 7192, *reprinted in* 10 INT'L LEGAL MATERIALS 133 (1971). As of 1 September 1976, 78 states, *not* including Algeria, Libya, and Kuwait, were parties to the convention. Other conventions adopting the extradite-or-prosecute duty are the (Montreal) Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, art. 7, [1973] 24 U.S.T. 565, T.I.A.S. No. 7570, *reprinted in* 10 INT'L LEGAL MATERIALS 1151 (1971), and the United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons Including Diplomatic Agents, G.A. Res. 3166, 28 U.N. GAOR, Supp. (No. 30), art. 7, U.N. Doc. A/9030 (1973). Since repeated treaty practice may contribute to the development of a customary international law norm binding upon all states, Starke, *Treaties as a 'Source' of International Law*, 23 BRIT. Y.B. INT'L 341 (1946), it can be argued that when a state fails to extradite or prosecute a transnational terrorist today it is liable under state responsibility principles.

380. See text accompanying notes 107-18, 212-14, 377-79 *supra*.

such states now may save the lives and property of their nationals and of many other persons in later years. Additionally, the present failure by the United States and other states to press international claims generated by terrorist acts may create unfortunate counterexpectations, such as that a certain degree of terrorism will be tolerated if not condoned, at least when such acts occur outside their borders. As Paust has observed, "[h]uman rights expectations seem to prohibit all forms of violent terrorism per se."³⁸¹ Thus all states should avoid even the appearance of a pragmatic accommodation with terrorism.

2. An examination of the primary sources (state practice, arbitral decisions, and codification attempts) of the law of state responsibility for injuries to aliens reveals an ample body of precedents and principles to support international claims by states against other states for injuries to the lives and property of their nationals occasioned by various terrorist acts which the other states have failed to prevent or punish. Since states have a moral if not a legal duty to protect their nationals,³⁸² they should bring such claims on their nationals' behalf whenever appropriate, not only for the benefit of their nationals but for the concerns mentioned in the above point regarding human rights expectations as well.

3. Focusing upon fact patterns which would support an international claim based upon a state's violation of state responsibility norms in the terrorism context, one may predicate liability on a scale of responsibility beginning with active involvement and descending to benign neglect. Although there is considerable overlapping, for convenience the situations may be categorized as follows:

- a. *Subsidization and support of terrorists.* In this case, there is no question but that the state sponsoring the terrorists is liable under state responsibility principles. Not only do the traditional norms fit this situation like a glove, but it is covered specifically by the Declaration on Friendly Relations.³⁸³ Libya is a state against which claims of this type easily could be brought.³⁸⁴

381. Paust, *supra* note 372, at 445.

382. See generally Seyersted, *Has the Government a Duty to Accord Diplomatic Assistance and Protection to its Nationals?*, 12 SCANDINAVIAN STUDIES IN LAW 121 (F. Schmidt ed. 1968). For a recent statement of the position of the United States regarding its duty to protect nationals, see [1973] DIGEST OF U.S. PRACTICE IN INTERNATIONAL LAW ch. 9, § 1, at 333 (A. Rovine ed. 1974).

383. See notes 194-96 & accompanying text *supra*.

384. Editorial, *The Master of the Assassins*, The Times (London), Mar. 23, 1976, at

- b. *Complicity with terrorists.* In this case, too, there is no question but that the state involved is responsible. Complicity may be predicated upon a state's behavior before or after the actual terrorist act. A classic example of complicity, after and perhaps also before the terrorist act, was furnished by President Amin of Uganda at the time of the Entebbe hijacking.³⁸⁵
- c. *Encouraging, counseling, and creating opportunity for terrorists.* Unlike the above two cases, state involvement here is not direct. Hence, although the state concerned cannot be presumed to be liable, liability may be found upon proof of a causal nexus. Israel for instance has argued that state responsibility principles render several Arab states liable to it on this theory.³⁸⁶
- d. *Permitting acts by terrorists.* This case is probably the most common. It differs from its three predecessors in that liability is grounded not upon the state's active or passive participation in the terrorist venture, but upon its failure to use "due diligence" to prevent its occurrence. Thus a causal nexus again must be found to establish liability. Arguably, West Germany could have been held responsible on this basis for its failure to prevent the Munich tragedy.³⁸⁷
- e. *Failure to apprehend, punish, or extradite terrorists.* In the case of local transnational terrorism, failure to use "due diligence" to apprehend, prosecute, and punish terrorists clearly will support claims based upon state responsibility norms. Thus the derisory sentences given by Sudan to the eight terrorists convicted of murdering the United States Ambassador and Deputy Chief of Mission—to say nothing of the terrorists' prompt release to the PLO—surely make out a strong *prima facie* case.³⁸⁸ Where nonlocal transnational terrorism is involved, the doctrines of asylum and extradition make such claims more difficult to establish. Nevertheless, the emerging international consensus against terrorism³⁸⁹ may warrant pursuing these claims in the future.

15, col. 1; *Libyans Arm and Train World Terrorists*, N.Y. Times, July 16, 1976, § A, at 1, col. 1.

385. See The Times (London), July 6, 1976, at 1, col. 1. But see *No Collusion With Entebbe Hijackers, Ugandans Say*, The Times (London), Nov. 17, 1976, at 9, col. 1.

386. See notes 120-21 & accompanying text *supra*.

387. See note 112 & accompanying text *supra*.

388. See text accompanying notes 221-22 *supra*.

389. See note 379 & accompanying text *supra*.

4. In assessing potential claims under the above five fact patterns, care must be taken to marshal the facts upon which the application of broad, general principles (such as "due diligence") turn. Also, possible defenses must be reviewed. Is a state to be held liable, for instance, when it is politically or militarily impotent and hence without the capacity to crack down on terrorists operating within its borders? Similarly, is responsibility to be imposed when a state, acting under duress and intent on saving the lives of hostages, fails to apprehend or punish admitted terrorists? These and other factors, on which there often is little direct state responsibility precedent, should be taken into account before a decision to press a claim is made.

5. When formulating legal arguments to support potential claims, it should be remembered that certain trade-offs are involved. For instance, were it to press uniformly for a strict standard of accountability, the United States would be championing a rule which, given its open society, it would find more difficult to comply with than would a nondemocratic state. In short, the higher the standard, the more a democratic state is exposed to liability unless it takes repressive measures to prevent and punish terrorist acts. Some measures, which other states might adopt with ease, would be unconstitutional. Other measures might necessitate such invasions of privacy as to be politically and socially unpalatable. Absent the taking of such measures, however, democratic states must be prepared to pay the price—literally—by responding in damages to claims by other, often nondemocratic states. On balance the cost is relatively cheap in terms of the democracies' interest in reducing terrorism, and certainly it is far preferable to maintain a high standard of accountability, even at a price, than to opt for a lower one. Nevertheless, it is a price that may have to be paid, and hence should be kept in mind.

6. The above problem is part of a larger one flowing from the principle of reciprocity. Under this "mirror image" principle, the state responsibility norms projected in the terrorism context by the United States and likeminded governments naturally will be reflected back in potential claims by other states. Indeed, probably one of the least anticipated conclusions emerging from this article is the extent of potential claims against the United States. The Soviet Union, for example, already has protested shootings directed at Soviet property in the United States, harassment of Soviet officials and their families, and various anti-Soviet demonstrations in New York, going so far as to assert that there exists a de facto connivance ("popustitelsvo") between the United States authorities and the perpetrators of the ter-

rorist acts.³⁹⁰ In June 1976, after a second bomb explosion at the Yugoslav Embassy in Washington, D.C., Yugoslavia, long a target of terrorist activities in the United States, charged that United States "authorities, including the Federal Bureau of Investigation and local police forces, tacitly encourage terrorism against Yugoslav diplomats."³⁹¹ Recently, Cuba first threatened to cancel the United States-Cuban antihijacking agreement unless the United States prevented further bomb attacks against Cuba's United Nations mission in New York,³⁹² and subsequently renounced the agreement altogether after charging the United States with "complicity" in the October 1976 crash of a Cuban airliner that took seventy-three lives.³⁹³ Friendly relations with Great Britain and Ireland undoubtedly prevent the bringing of any claim, but the activities of various prominent New York City politicians in support of the Provisional Irish Republican Army certainly seem to make out a *prima facie* case of state responsibility.³⁹⁴ Once again, on balance, having to respond in the above

390. The Soviet notes making such assertions were made available to the authors by Professor Gordon B. Baldwin, who during 1975-1976 served as Counselor in the Office of the Legal Adviser of the Department of State. See generally N.Y. Times, Mar. 13, 1976, at 27, col. 8; *id.*, Apr. 3, 1976, at 10, col. 3; *id.*, Apr. 7, 1976, at 7, col. 1. That the United States is concerned with this matter is shown by the fact that the head of the Jewish Defense League for the Washington, D.C., area was convicted recently of conspiring to shoot out the windows in the apartments of two Soviet embassy officials. *Id.*, Nov. 26, 1976, § B, at 13, col. 5.

That the Soviet experience is part of a more general problem is clear from the fact that on 5 March 1976 the United Nations Committee on Relations with the Host Country "strongly condemned the terrorist and other unlawful acts perpetrated against the missions of India, Iraq, Laos, Mongolia and the USSR and their personnel, as well as those committed against any other missions, as being fundamentally incompatible with the status of missions and their personnel under international law." U.N. Monthly Chronicle, Apr., 1976, at 45, col. 4.

391. N.Y. Times, June 21, 1976, at 6, col. 1. Following the hijacking of a United States airliner by Croatians in September 1976, Yugoslavia went so far as to assert that "the United States tolerates anti-Yugoslav terrorist activities." *Id.*, Sept. 13, 1976, at 18, col. 5.

392. The Times (London), June 8, 1976, at 7, col. 1.

393. N.Y. Times, Oct. 16, 1976, at 1, col. 2. For subsequent developments in this case, see *id.*, Oct. 20, 1976, at 74, col. 1; *id.*, Oct. 21, 1976, at 6, col. 1; *id.*, Oct. 22, § A, at 4, col. 3; *id.*, Oct. 26, 1976, at 4, col. 3; *id.*, Oct. 28, 1976, at 4, col. 4; *id.*, Nov. 1, 1976, at 9, col. 1; *id.*, Nov. 3, 1976, at 43, col. 4; *id.*, Nov. 4, 1976, at 29, col. 6; *id.*, Nov. 13, 1976, at 5, col. 1. On the extent to which the terrorist acts of anti-Castro Cuban exiles have been tolerated, if not encouraged, by some Latin American states, see *id.*, Nov. 15, 1976, at 10, col. 1.

394. Lewis, *Shadow of the Gunmen*, *id.*, July 22, 1976, at 31, col. 1. That the United States has moved of late to prevent the furnishing of direct military support may be seen from the following cases involving prosecutions for IRA-gunrunning: United States v.

cases—even upon occasion in damages—is a cheap price to pay in terms of the interest of the United States and likeminded governments in developing norms that condemn terrorism. Nevertheless, it is a cost to be kept in mind.

7. Assuming that a state decides to bring a claim in an appropriate case, what are the obstacles likely to be met? Initially, and not unexpectedly, the other state undoubtedly will not acknowledge responsibility. Nor, most likely, will it agree to international arbitration. A formal proceeding might be instituted in the International Court of Justice, which would call attention to the claim but undoubtedly would fail for want of jurisdiction, or the matter might be raised before the Security Council or some other organ of the United Nations, probably to no avail. There are, therefore, a multiplicity of channels to which resort may be had, and while the immediate outcome may be unsatisfactory—in the sense that in the vast majority of claims no recovery will be forthcoming—the international “consciousness raising” aspects of the exercise will have been achieved. Also, in the occasional instance, if past experience is any indication, compensation may be obtained, although perhaps on an *ex gratia* basis. In short, the obstacles facing a claim are steep but not insurmountable, and the avenue of diplomatic protest—short of bringing a formal claim—is always open and frequently worth taking.

The above seven points demonstrate that there are a good many instances where the United States and likeminded states, invoking principles of state responsibility, could bring claims successfully today for injuries to the lives and property of their nationals occasioned by terrorist activities. By bringing such claims, these states might achieve some redress for their aggrieved individuals or corporations.³⁹⁵ Even more important, they would be registering a strong belief that terrorist acts not only are immoral, but that they violate the traditional norms of international law as well.

O'Looney, 544 F.2d 385 (9th Cir. 1976); United States v. Grady, 544 F.2d 598 (2d Cir. 1976); United States v. Byrne, 422 F. Supp. 147 (E.D. Pa. 1976).

395. The claims of individuals and corporations that most commonly come to mind involve death or personal injury claims based upon terrorist attacks and property claims based upon the payment of ransom to obtain the release of corporate officials kidnapped by terrorists. That a far wider range of claims is involved may be seen from recent litigation in the United States between injured passengers, air carriers, and insurance companies over who should bear the losses occasioned during hijacking incidents and other terrorist attacks on international civil aviation. See, e.g., Day v. TWA, 393 F. Supp. 217 (S.D.N.Y.), *aff'd*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 97 S. Ct. 246 (1976). Ideally, state responsibility principles might be brought into play to obtain some compensation from various foreign states and thus achieve a more equitable distribution of loss.

The time to develop and assert state responsibility arguments in the terrorism context is overdue. It is particularly appropriate to commence such efforts now because attempts to create new international norms and machinery to cope with the problem, while not entirely stalled, certainly are not moving ahead rapidly.³⁹⁶ By the process of claim and counterclaim; a geometric body of contemporary precedent covering state responsibility for terrorist acts could be built up over the next few years, while at the same time keeping the issue of the need for new legal rules and restraints alive. As mentioned in points 5 and 6 above, the costs of this approach are minimal in relation to its potential benefits. For all these reasons, the United States and likeminded governments would be well advised to select a few strong test cases supported by the major state responsibility principles considered in this article and press them vigorously and imaginatively in the years ahead.

396. The United Nations General Assembly recently established a 35-member committee to draft an international convention prohibiting the taking of hostages. N.Y. Times, Dec. 16, 1976, at 3, col. 3. The committee is to begin work in August 1977 and complete a draft text in time for submission to the next session of the General Assembly in September. *Id.*, Dec. 10, 1976, § A, at 11, col. 1. What kind of convention will emerge from the committee and what its reception will be in the General Assembly are matters of speculation. One supporter of the convention has predicted that the undertaking will be "as tricky as moving through a minefield." *Id.* This figure of speech seems particularly appropriate.